

(i) Include the criteria enumerated in paragraph (b) of this section;

(ii) Address all of the functions enumerated in paragraph (d) of this section;

(iii) Provide for airport information, passenger information cards, crewmember verification of appropriate seating in exit rows, passenger briefings, seat assignments, and denial of transportation as set forth in paragraphs (e) through (i) and (o) of this section;

(2) Certificate holders shall submit their procedures for preliminary review

and approval to the principal operations inspectors assigned to them at the FAA Flight Standards District Offices that hold their certificates.

(o) Certificate holders shall:

(1) Deny transportation only on the basis of refusal to comply with instructions as set forth in paragraph (c) of this section; and

(2) Assign seats prior to boarding consistent with the criteria in paragraph (b) and the functions in paragraph (d) of this section, to the maximum extent feasible.

(p) The procedures required by paragraph (m) of this section will not become effective until final approval is granted by the Director, Flight Standards Service, Washington, DC. Approval will be based solely upon the safety aspects of the certificate holders' procedures.

Issued in Washington, DC, on March 7, 1989.

D.C. Beaudette,

Acting Director, Flight Standards Service.

[FR Doc. 89-5631 Filed 3-8-89; 11:21 am]

BILLING CODE 4910-13-M

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Register Federal

**Monday
March 13, 1989**

Part III

Department of Education

34 CFR Part 250 et al.

**Intergovernmental Review of Department
of Education Programs and Activities;
Notice of Proposed Rulemaking**

DEPARTMENT OF EDUCATION

34 CFR Parts 250, 300, 315, 324, 332, 366, 369, 385, 396, 400, 607, 608, 609, 624, 628, 629, 630, 631, 637, 639, 643, 644, 645, 646, 649, 656, 657, 658, 692, 745, 755, and 773

Intergovernmental Review of Department of Education Programs and Activities

AGENCY: Department of Education.

ACTION: Notice of Proposed Rulemaking.

SUMMARY: The Secretary proposes to issue regulations implementing changes in coverage for Department of Education programs subject to Executive Order 12372 (Intergovernmental Review of Federal Programs). These changes are required in order to comply with an Office of Management and Budget (OMB) memorandum, issued March 14, 1985, amending the criteria for inclusion and exclusion of State review under the Executive Order. This notice is also required in order to provide an opportunity for public comment on proposed revisions to the lists of included and excluded programs, and selection by each State of the programs to be subject to that State's review process.

DATE: Comments must be received on or before June 12, 1989.

ADDRESSES: All comments concerning these proposed rules should be addressed to F. LeRoy Walser, Office of Intergovernmental and Interagency Affairs, Department of Education, 400 Maryland Avenue, SW, FOB-6, Room 3059, Washington, DC 20202.

FOR FURTHER INFORMATION CONTACT: F. LeRoy Walser, Telephone: (202) 732-3669.

SUPPLEMENTARY INFORMATION: Executive Order 12372 provides an opportunity for States to review applications for Federal assistance programs which directly affect State and local governments. The Executive Order, signed July 14, 1982, is designed "to foster an intergovernmental partnership and a strengthened federalism by relying on State and local processes for the State and local government coordination and review of proposed Federal financial assistance and direct Federal development."

On June 24, 1983 (at 48 FR 29158), the Department published regulations at 34 CFR Part 79 implementing the Executive Order. The Department published amendments to these regulations (at 51 FR 20823, June 9, 1986) to implement changes in criteria for program coverage issued in OMB's March 14, 1985,

memorandum entitled "Procedural Changes in Agency Implementation of Executive Order 12372."

The Department has reviewed all of its current programs for coverage under the Executive Order according to the revised OMB criteria. Under these criteria, a Federal assistance program or activity is included for State review unless the program or activity does not directly affect State or local governments, is proposed Federal legislation, regulation, or budget formulation, or involves one of the following: (1) National security, (2) procurement, (3) direct payments to individuals, (4) financial transfers for which Federal agencies have no funding discretion or direct authority to approve specific sites or projects (e.g., Chapter 2 of the Education Consolidation and Improvement Act of 1981), (5) research and development that is national in scope, and (6) assistance to federally-recognized Indian tribes).

The Department proposes two new appendices which would supersede those previously published. These appendices would implement the new OMB criteria for coverage and add certain programs that were enacted or amended prior to passage of Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100-297. Any changes in coverage or new coverage required by Pub. L. 100-297 will be made in the regulations developed to implement the Act. At Appendix A are programs proposed for inclusion for State review under Executive Order 12372; at Appendix B are programs proposed for exclusion from State review and the justification for the proposed exclusion.

Executive Order 12291

These proposed regulations have been reviewed in accordance with Executive Order 12291. They are not classified as major because they do not meet the criteria for major regulations established in the order.

Regulatory Flexibility Act Certification

Since these proposed regulations would implement the opportunity for review of existing programs by State and local governments, would simplify consultation with Department, and would allow State and local governments to establish cost effective consultation procedures, the Secretary certifies that these proposed regulations would not have a significant economic impact on a substantial number of small entities.

Paperwork Reduction Act of 1980

These proposed regulations have been examined under the Paperwork Reduction Act of 1980 and have been found to contain no information collection requirements.

Invitation To Comment

Interested persons are invited to submit comments and recommendations regarding these proposed regulations.

All comments submitted in response to these proposed regulations will be available for public inspection, during and after the comment period, in Room 3059, FOB-6, 400 Maryland Avenue, SW., Washington, DC 20202, between the hours of 8:30 a.m. and 4:00 p.m., Monday through Friday of each week, except Federal holidays.

To assist the Department in complying with specific requirements of Executive Order 12291 and the Paperwork Reduction Act of 1980 and their overall requirement of reducing regulatory burden, the Secretary invites comment on whether there may be further opportunities to reduce regulatory burdens found in these proposed regulations.

Assessment of Educational Impact

The Secretary particularly requests comments on whether the proposed regulations in this document would require transmission of information that is being gathered by or is available from any other agency or authority of the United States.

List of Subjects

38 CFR Part 250

Administrative practice and procedure, Education, Indian education.

34 CFR Part 300

Administrative practice and procedure, Education, Education of handicapped, Equal educational opportunity, Privacy, Private schools.

34 CFR Part 315

Education, Education of handicapped, Education—research, Government contracts, Student aid, Teachers.

34 CFR Part 324

Education, Education of handicapped, Education—research, Local educational agency, School, State educational agency.

34 CFR Part 332

Education, Education of handicapped.

34 CFR Part 366

Education, Grant programs—social programs, Vocational rehabilitation.

34 CFR Part 369

Education, Grant programs—social programs, Vocational rehabilitation.

34 CFR Part 385

Education, Vocational rehabilitation.

34 CFR Part 396

Education, Vocational rehabilitation.

34 CFR Part 400

Adult education, Education, Education of disadvantaged, Equal educational opportunity, Private schools, Schools, School construction, Vocational education, Women.

34 CFR Part 607

Colleges and universities, Education.

34 CFR Part 608

Colleges and universities, Education.

34 CFR Part 609

Colleges and universities, Education.

34 CFR Part 624

Colleges and universities, Education.

34 CFR Part 628

Colleges and universities, Education.

34 CFR Part 629

Adult education, Colleges and universities, Education, Veterans.

34 CFR Part 630

Colleges and universities, Education, Government contracts.

34 CFR Part 631

Colleges and universities, Education, Educational research, Employment, Manpower training programs, Student aid.

34 CFR Part 637

Colleges and universities, Education, Education of disadvantaged, Educational study programs, Equal educational opportunity, Science and technology.

34 CFR Part 639

Colleges and universities, Education, Educational study programs, Law.

34 CFR Part 643

Colleges and universities, Education, Education of disadvantaged, Education of handicapped.

34 CFR Part 644

Colleges and universities, Education of disadvantaged, Education, Education of handicapped.

34 CFR Part 645

Colleges and universities, Education, Education of disadvantaged, Education of handicapped.

34 CFR Part 646

Bilingual education, Education, Education of disadvantaged, Education of handicapped, Government contracts.

34 CFR Part 649

Colleges and universities, Education, Energy, Mineral resources, Mines, Scholarships and fellowships.

34 CFR Part 656

Colleges and universities, Cultural exchange programs, Education, Educational study programs, Foreign languages, Fellowships, Resource center.

34 CFR Part 657

Education, Educational study programs, Fellowships.

34 CFR Part 658

Colleges and universities, Education, International education.

34 CFR Part 692

Education, State-administered-education, Student aid.

34 CFR Part 745

Education, Government contracts, Sex discrimination.

34 CFR Part 755

Colleges and universities, Education, Local educational agency, State educational agency.

34 CFR Part 773

Colleges and universities, Education, Libraries.

Dated: December 19, 1988.

Lauro F. Cavazos,

Secretary of Education.

The Secretary proposes to amend Parts 250, 300, 324, 332, 366, 369, 385, 396, 400, 607, 608, 609, 624, 628, 629, 630, 631, 637, 639, 643, 644, 645, 648, 649, 656, 657, 658, 692, 706, 745, 755, and 773 of Title 34 of the Code of Federal Regulations as follows:

PART 250—INDIAN EDUCATION ACT—GENERAL PROVISIONS

1. The authority citation for Part 250 is revised to read as follows:

Authority: 20 U.S.C. 241aa–241ff, 1231a, 1221h, 3385, 3385a, unless otherwise noted.

2. Section 250.3 is amended by revising paragraph (e) to read as follows:

§ 250.3 What regulations apply to these programs?

(e) 34 CFR Part 79 (Intergovernmental Review of Department of Education programs and Activities), except that applications for assistance submitted by Federally recognized Indian tribes are not subject to review under Part 79, and Part 79 does not apply to 34 CFR Parts 252, 253, and 256.

(Authority: 20 U.S.C. 241aa–241ff, 1211a, 3385, 3385a)

PART 300—ASSISTANCE TO STATES FOR EDUCATION OF HANDICAPPED CHILDREN

3. The authority citation for Part 300 continues to read as follows:

Authority: 20 U.S.C. 1411–1420, unless otherwise noted.

§ 300.3 [Amended]

4. Section 300.3(a)(1) is amended by removing "Programs) and Part 77 (Definitions)." and adding, in their place, "Programs) Part 77 (Definitions), Part 78 (Education Appeal Board), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)."

PART 315—PROGRAM FOR SEVERELY HANDICAPPED CHILDREN

5. The authority citation for Part 315 continues to read as follows:

Authority: 20 U.S.C. 1424, unless otherwise noted.

6–8. In § 315.3, paragraphs (b)(3), and (4) are revised and a new paragraph (b)(5) is added to read as follows:

§ 315.3 What regulations apply to this program?

(b) * * *

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(Authority: 20 U.S.C. 1424, 20 U.S.C. 3474(a))

PART 324—RESEARCH IN EDUCATION OF THE HANDICAPPED PROGRAM

9. The authority citation for Part 324 continues to read as follows:

Authority: 20 U.S.C. 1441–1444, unless otherwise noted.

10. In § 324.3, paragraphs (b)(3) and (4) are revised and a new paragraph (b)(5) is added to read as follows:

§ 324.3 What regulations apply to this program?

(b) * * *

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(Authority: 20 U.S.C. 1441-1444)

PART 332—EDUCATIONAL MEDIA RESEARCH, PRODUCTION, DISTRIBUTION, AND TRAINING

11. The authority citation for Part 332 is revised to read as follows:

Authority: 20 U.S.C. 1451-1452, unless otherwise noted.

§ 332.3 [Amended]

12. Section 332.3 is amended by removing "77 and" and adding, in their place, the words "77, 78, and 79, and".

PART 366—CENTERS FOR INDEPENDENT LIVING

13. The authority citation for Part 366 is revised to read as follows:

Authority: 29 U.S.C. 711(c) and 796(e), unless otherwise noted.

§ 366.3 [Amended]

14. Section 366.3(a) is amended by removing the word "and" each place it appears, and by adding the words "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 369—VOCATIONAL REHABILITATION SERVICE PROJECTS

15. The authority citation for Part 369 is revised to read as follows:

Authority: 29 U.S.C. 711(c), 732, 750, 775, 777a (a)(1) and (a)(3), 777b, 777f and 795g, unless otherwise noted.

§ 369.3 [Amended]

16. Section 369.3(a) is amended by removing the word "and", and by adding "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities), except that Part 79 does not apply to the Handicapped American Indian Vocational Rehabilitation Service Projects (34 CFR Part 371)" before the period at the end of the sentence.

PART 385—REHABILITATION TRAINING

17. The authority citation for Part 385 is revised to read as follows:

Authority: 29 U.S.C. 711(c), 744, and 776, unless otherwise noted.

§ 385.3 [Amended]

18. Section 385.3(a) is amended by removing the word "and", and by adding "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 396—TRAINING OF INTERPRETERS FOR DEAF INDIVIDUALS

19. The authority citation for Part 396 is revised to read as follows:

Authority: 29 U.S.C. 744(d), unless otherwise noted.

20. In § 396.3, paragraphs (a) (3) and (4) are revised and a new paragraph (b)(5) is added to read as follows:

§ 396.3 What regulations apply to this program?

(a) * * *

(3) Part 77 (Definitions that Apply to Department Regulations);

(4) Part 78 (Education Appeal Board); and

(5) Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(Authority: 29 U.S.C. 774(d))

PART 400—VOCATIONAL EDUCATION PROGRAMS—GENERAL PROVISIONS

21. The authority citation for Part 400 continues to read as follows:

Authority: 20 U.S.C. *et seq.*, unless otherwise noted.

§ 400.3 [Amended]

22. Section 400.3(f) is amended by adding "except that Part 79 does not apply to any applications submitted by an Indian tribal organization that is eligible under 34 CFR 410.2(a)(1) of the Indian and Hawaiian Natives Program (34 CFR Part 410)" before the period at the end of the sentence.

PART 607—STRENGTHENING INSTITUTIONS PROGRAMS

23. The authority citation for Part 607 continues to read as follows:

Authority: 20 U.S.C. 1057-1059, 1066-1069f, unless otherwise noted.

§ 607.6 [Amended]

24. Section 607.6(a) is amended by removing "Regulations; and Part 78 (Education Appeal Board)." and adding in their place "Regulations; Part 78 (Education Appeal Board); and Part 79 (Intergovernmental Review of

Department of Education Programs and Activities)."

PART 608—STRENGTHENING HISTORICALLY BLACK COLLEGES AND UNIVERSITIES PROGRAM

25. The authority citation for Part 608 continues to read as follows:

Authority: 20 U.S.C. 1060 through 1063a, 1063c and 1069c, unless otherwise noted.

§ 608.3 [Amended]

26. Section 608.3(a) is amended by removing the word "and", and adding "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 609—STRENGTHENING HISTORICALLY BLACK GRADUATE INSTITUTIONS PROGRAM

27. The authority citation for Part 609 continues to read as follows:

Authority: 20 U.S.C. 1063b and 1069c, unless otherwise noted.

§ 609.3 [Amended]

28. Section 609.3(a) is amended by removing the word "and" and adding "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," before the period at the end of the sentence.

PART 624—INSTITUTIONAL AID PROGRAMS—GENERAL PROVISIONS

29. The authority citation for Part 624 continues to read as follows:

Authority: 20 U.S.C. 1051-1069c, unless otherwise noted.

§ 624.5 [Amended]

30. Section 624.5(a) introductory text is amended by removing "and", and adding in its place a comma after "(Direct Grant Programs)" and adding "34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)," after "(Definitions)".

PART 628—ENDOWMENT CHALLENGE GRANT PROGRAM

31. The authority citation for Part 628 continues to read as follows:

Authority: 20 U.S.C. 1065a, unless otherwise noted.

32. In § 628.5, paragraph (b)(1)(v) is added and paragraph (b)(2) is revised to read as follows:

§ 628.5 What regulations apply to the Endowment Challenge Grant Program?

(b)(1) * * *

(v) The regulations in 34 CFR Part 79.

(2) Except as specifically indicated in paragraph (b)(1) of this section, the Education Department General Administrative Regulations (EDGAR) in 34 CFR Parts 74 through 77 do not apply.

(Authority: 20 U.S.C. 1065a)

PART 629—VETERANS EDUCATION OUTREACH PROGRAM

33. The authority citation for Part 629 continues to read as follows:

Authority: 20 U.S.C. 1070e-1, unless otherwise noted.

34. In § 629.4, paragraph (a)(5) is added to read as follows:

§ 629.4 What regulations apply?

* * *

(a) * * *

(5) 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities).

(Authority: 20 U.S.C. 1070e-1, 1088)

PART 630—FUND FOR THE IMPROVEMENT OF POSTSECONDARY EDUCATION

35. The authority citation for Part 630 continues to read as follows:

Authority: 20 U.S.C. 1135-1135a-2, 1135e-1, unless otherwise noted.

§ 630.4 [Amended]

36. Section 630.4(a)(1) is amended by removing the word "and" and by adding before the period at the end of the sentence "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 631—COOPERATIVE EDUCATION PROGRAM—GENERAL

37. The authority citation for Part 631 continues to read as follows:

Authority: 20 U.S.C. 1133-1133b, unless otherwise noted.

§ 631.4 [Amended]

38. Section 631.4(a)(1) is amended by removing the word "and", and by adding before the period at the end of the sentence "and 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 637—MINORITY SCIENCE IMPROVEMENT PROGRAM

39. The authority citation for Part 637 continues to read as follows:

Authority: 20 U.S.C. 1135b-1135b-3, 1135d-1135d-6, unless otherwise noted.

§ 637.3 [Amended]

40. Section 637.3(a) is amended by removing the word "and", and by adding before the period at the end of the sentence, "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 639—LAW SCHOOL CLINICAL EXPERIENCE PROGRAM

41. The authority citation for Part 639 continues to read as follows:

Authority: 20 U.S.C. 1134s-1134t, unless otherwise noted.

§ 639.3 [Amended]

42. Section 639.3(a) is amended by removing the word "and" after the words "(Direct Grant Programs)" and adding, in its place, a comma, and by removing the word "(Definitions)" and adding, in its place, the words "(Definitions that Apply to Department Regulations), and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 643—TALENT SEARCH PROGRAM

43. The authority citation for Part 643 continues to read as follows:

Authority: 20 U.S.C. 1070d-1, unless otherwise noted.

§ 643.5 [Amended]

44. Section 643.5(a) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence, "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 644—EDUCATIONAL OPPORTUNITY CENTERS PROGRAM

45. The authority citation for Part 644 continues to read as follows:

Authority: 20 U.S.C. 1070d-1c, unless otherwise noted.

§ 644.5 [Amended]

46. Section 644.5(a) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 645—UPWARD BOUND PROGRAM

47. The authority citation for Part 645 continues to read as follows:

Authority: 20 U.S.C. 1070d, 1070d-1a, unless otherwise noted.

§ 645.5 [Amended]

48. Section 645.5(a) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 646—STUDENT SUPPORT SERVICES PROGRAM

49. The authority citation for Part 646 continues to read as follows:

Authority: 20 U.S.C. 1070d, 1070d-1b, unless otherwise noted.

§ 646.5 [Amended]

50. Section 646.5(a) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 649—PATRICIA ROBERTS HARRIS FELLOWSHIPS PROGRAM

51. The authority citation for Part 649 continues to read as follows:

Authority: 20 U.S.C. 1134d-1134f, unless otherwise noted.

§ 649.3 [Amended]

52. Section 649.3(a) is amended by removing the word "and" after the words "Department Regulations," and by adding after the words "Appeal Board)," "and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 656—NATIONAL RESOURCE CENTERS PROGRAM FOR LANGUAGE AND AREA OR LANGUAGE AND INTERNATIONAL STUDIES

53. The authority citation for Part 656 is revised to read as follows:

Authority: 20 U.S.C. 1122, unless otherwise noted.

§ 656.6 [Amended]

54. Section 656.6(c) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence "and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 657—FOREIGN LANGUAGE AND AREA STUDIES FELLOWSHIPS PROGRAM

55. The authority citation for Part 657 is revised to read as follows:

Authority: 20 U.S.C. 1122, unless otherwise noted.

56. Section 657.4(c) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 658—UNDERGRADUATE INTERNATIONAL STUDIES AND FOREIGN LANGUAGE PROGRAM

57. The authority citation for Part 658 is revised to read as follows:

Authority: 20 U.S.C. 1124, unless otherwise noted.

§ 658.3 [Amended]

58. Section 658.3(c) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and 34 CFR Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 692—STATE STUDENT INCENTIVE GRANT PROGRAM

59. The authority citation for Part 692 is revised to read as follows:

Authority: 20 U.S.C. 1070c-1070c-4, unless otherwise noted.

§ 692.3 [Amended]

60. Section 692.3(b) is amended by removing the word "and", and by adding before the period at the end of the sentence ", and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 745—WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM

63. The authority citation for Part 745 continues to read as follows:

Authority: 20 U.S.C. 3341-3348, unless otherwise noted.

§ 745.3 [Amended]

64. Section 745.3(a)(1) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 755—SECRETARY'S DISCRETIONARY PROGRAM FOR MATHEMATICS, SCIENCE, COMPUTER LEARNING, AND CRITICAL FOREIGN LANGUAGES

65. The authority citation for Part 755 is revised to read as follows:

Authority: 20 U.S.C. 2992, unless otherwise noted.

§ 755.3 [Amended]

66. Section 755.3(a)(1) is amended by removing the word "and" and adding, in its place, a comma, and by adding before the period at the end of the sentence ", and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

PART 773—COLLEGE LIBRARY RESOURCES PROGRAM

67. The authority citation for Part 773 is revised to read as follows:

Authority: 20 U.S.C. 1021 *et seq.*, unless otherwise noted.

§ 773.4 [Amended]

68. Section 773.4(a) is amended by removing "and" after "(Direct Grant Programs)" and adding, in its place, a comma, and by removing "(Definitions);" and adding, in its place, "(Definitions that Apply to Department Regulations), and Part 79 (Intergovernmental Review of Department of Education Programs and Activities)".

[Editorial Note: The following Appendices will not appear in the Code of Federal Regulations.]

Appendix A—Programs Proposed for Inclusion for State Review Under Executive Order 12372

Program Name	CFDA #
Adult education—state administered program.	84.002.
Bilingual education.....	84.003.
Desegregation of public education.....	84.004.
College library resources.....	84.005.
Supplemental educational opportunity grants.	84.007.
Follow through.....	84.014.
National resource centers and fellowship program for language and area or language and international studies.	84.015.
Undergraduate international studies and foreign language program.	84.016.
Research in education of the handicapped.	84.023.
Handicapped children's early education program.	84.024.
Services for deaf-blind children and youth.	84.025N.
Handicapped media services and captioned films.	84.026.
Assistance to states for education of handicapped children.	84.027.

Program Name	CFDA #
Regional resource and federal centers.	84.028.
Training personnel for the education of the handicapped.	84.029.
Clearinghouse for the handicapped program.	84.030.
Strengthening institutions program.....	84.031A.
Strengthening historically black colleges and universities.	84.031B.
Endowment challenge grant program.....	84.031G.
Public library services.....	84.034.
Interlibrary cooperation.....	84.035.
Library career training-fellowships.....	84.036.
Library research and demonstration.....	84.039.
School assistance in federally affected areas—construction.	84.040.
Student support services program.....	84.042.
Talent search.....	84.044.
Upward bound.....	84.047.
Vocational education—basic grants to states.	84.048.
Vocational education—consumer and homemaking education.	84.049.
Vocational education—state advisory councils.	84.053.
Cooperative education.....	84.055.
*Indian education—formula grants to local education agencies and tribal schools.	84.060.
*Indian education—special programs and projects.	84.061.
*Indian education—adult indian education.	84.062.
Veterans education outreach program.	84.064.
Educational opportunity centers.....	84.066.
State student incentive grant program.	84.069.
*Indian education—grants to indian controlled schools.	84.072.
National diffusion network.....	84.073.
Patricia Roberts Harris program (fellowships for graduate and professional studies program).	84.075.
Bilingual vocational training.....	84.077.
Postsecondary education programs for handicapped persons.	84.078.
Women's educational equity.....	84.083.
Program for severely handicapped children.	84.086.
Strengthening research library resources.	84.091.
Graduate and professional study.....	84.094.
Law school clinical experience.....	84.097.
Bilingual vocational instructor training.....	84.099.
Bilingual vocational instructional materials, methods, and techniques.	84.100.
Vocational education Hawaiian native program.	84.101C.
Training program for special program staff and leadership personnel.	84.103.
Fund for the improvement of post-secondary education.	84.116.
Minority science improvement program.	84.120.
Law-related education program.....	84.123.
Territorial teacher training assistance program.	84.124.
State vocational rehabilitation services program.	84.126.
Rehabilitation service projects.....	84.128.
Rehabilitation training.....	84.129.
Centers for independent living.....	84.132.
Migrant education high school equivalency program.	84.141.
College facilities loan program.....	84.142.
Migrant education—interstate and intrastate coordination program.	84.144.
Federal real property assistance program.	84.145.
Transition program for refugee children.	84.146.

Program Name	CFDA #	Program Name	CFDA #	Program	CFDA No.
College assistance migrant program....	84.149.	Vocational education-national pro-	No CFDA #.	Exclusion Justification:	
Neglected or delinquent transition	84.152.	grams: model centers for vocational		This program provides assistance for	
services.		education for older individuals.		the conduct of research, studies	
Business and international education ..	84.153.			and surveys and the development	
Library services and construction	84.154.			of instructional materials for modern	
act—construction.				languages and area and international	
Removal of architectural barriers to	84.155.			studies. Research is national in	
the handicapped.				scope and is conducted by individual	
Secondary education and transitional	84.158.			scholars.	
services for handicapped youth.				Fulbright-Hays training grants—faculty	84.019
Training interpreters for deaf individ-	84.160.			research abroad.	
uals.				Exclusion Justification:	
Client assistance for handicapped in-	84.161.			This program supports research	
dividuals.				projects conducted abroad by indi-	
Emergency immigrant education as-	84.162.			vidual research scholars in coopera-	
sistance act.				tion with bi-national commissions,	
Library services and construction act,	84.163B.			U.S. embassies, foreign ministries of	
title IV—basic grants to Indian				education, and institutions of higher	
tribes and Hawaiian native (Indian				education abroad. Research is of	
tribes excluded from coverage).				national and international scope.	
Strengthening teacher skills and in-	84.164.			Fulbright-Hays training centers—foreign	84.020
struction in mathematics and sci-				curriculum consultants.	
ence.				Exclusion Justification:	
Magnet schools assistance	84.165.			This program awards grants to institu-	
Library literacy program.....	84.167.			tions of higher education for the	
Secretary's discretionary program for	84.168.			selection of curriculum specialists	
mathematics, science, computer				from abroad to assist U.S. institu-	
learning, and critical foreign lan-				tions or groups of institutions in the	
guages.				development of programs of re-	
Construction, reconstruction, and	84.172.			search and study in the United	
renovation of academic facilities				States. This program does not	
program.				affect State or local governments	
Preschool grants for handicapped	84.173.			because the recruitment of individual	
children program.				candidates is made by U.S. embas-	
State assistance for vocational edu-	84.174.			sies, Fulbright Commissions abroad,	
cation-support programs by com-				or foreign ministries of education.	
munity based organizations.				Fulbright-Hays training grants, group	84.021
Paul T. Douglas teacher scholarship	84.176.			projects abroad.	
program.				Exclusion Justification:	84.021
Independent living for older blind	84.177.			This program awards grants to individ-	
adults.				uals through eligible institutions in	
Leadership in educational administra-	84.178.			the United States and abroad in	
tion development.				cooperation with Fulbright Commis-	
Technology, media and materials	84.180.			sions, U.S. Embassies, and foreign	
program.				ministries of education for the pur-	
Early intervention programs for in-	84.181.			pose of engaging in group projects	
fants and toddlers with handicaps.				in research, training, and curriculum	
Drug-free schools and communities	84.184.			development. Projects conducted	
program-training and demonstra-				abroad and at institutions in the	
tion grants to institutions of higher				United States are national in scope	
education, and federal activities				and do not directly affect State or	
program.				local governments.	
Drug-free schools and communi-	84.186.			Fulbright-Hays training grants—doctor-	84.022
ties—state and local programs.				al dissertation research abroad.	
The state supported employment	84.187.			Exclusion Justification:	
services program.				This fellowship program provides pay-	
Drug-free schools and communi-	84.188.			ments to individuals who have been	
ties—regional centers programs.				advanced to doctoral degree candi-	
Adult education for the homeless	84.192.			dacy in foreign languages and area	
program.				studies. Individual projects are con-	
Vocational education-national pro-	84.193.			ducted abroad and therefore the re-	
grams: demonstration centers for				search has no impact on States or	
the retraining of dislocated work-				local governments.	
ers.				Guaranteed student loan program and	84.032
Education of the homeless	84.196.			plus (auxiliary) loan program.	
College library technology and coop-	84.197.			Exclusion Justification:	
eration program.				These programs authorize low interest	
Workplace literacy partnerships pro-	84.198.			loans available from lenders such	
gram.				as banks and credit unions to help	
Vocational education-national coop-	84.199.			defray costs of education at partici-	
erative demonstration program.				pating institutions. The loans are	
School dropout demonstration assist-	84.201.			provided directly to the student or	
ance program.				to parents of the student.	
Star schools program	84.203.			College work-study program.....	84.033
State vocational education compre-	No CFDA #.			Exclusion Justification:	
hensive career guidance and				This program provides jobs for under-	
counseling program.				graduate and graduate students.	
State vocational education industry-	No CFDA #.			Participating institutions receive	
education partnerships.				direct allocations of Federal funds	
Vocational education-state equip-	No CFDA #.			according to national and State	
ment pools.				funding formulas. Funds are ulti-	
				mately paid directly to students.	

Appendix B.—Programs Proposed For Exclusion From Review Under Executive Order 12372 With Exclusion Justifications

Program	CFDA No.
Interest subsidy grants for academic facilities loans.	84.001
Exclusion Justification:	
Funds under this program were determined by prior action and the government's commitment is for the life of the loan. Since no application to the Federal government is involved, States do not review this program.	
Education of handicapped children in State operated schools.	84.009
Exclusion Justification:	84.009
Funds under this program are determined by a statutory formula. Therefore, the Department has no discretion in approving specific sites or in determining the amount of allocations.	
Educationally deprived children: local educational agencies.	84.010
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to participating local education agencies. Therefore, the Department has no discretion in approving specific sites or in determining the amount of allocations.	
Migrant education: State formula grant program.	84.011
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to State education agencies. Therefore, the Department has no discretion in approving specific sites or projects or in determining the amount of allocations.	
Educationally deprived children State administration.	84.012
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to State education agencies. Therefore, the Department has no discretion in approving specific sites or projects or in determining the amount of allocations.	
Neglected and delinquent children	84.013
Exclusion Justification:	
Funds under this program are determined by a statutory formula and distributed to State education agencies. Therefore, the Department has no discretion in approving specific sites or projects or in determining the amount of allocations.	
International research and studies.....	84.017

Program	CFDA No.	Program	CFDA No.	Program	CFDA No.
Perkins loan program to schools.....	84.037	Indian education fellowship for Indian students.	84.087	This program funds projects for data collection activities and studies; investigations; evaluations (to assess the impact and effectiveness of programs assisted under the Education of the Handicapped Act); and for the development, publication and dissemination of the Annual Report to Congress required under the Act. The projects address issues and research of national scope and the findings are used by national audiences, such as researchers, policy makers and Congress.	
Exclusion Justification:		Exclusion Justification:		Library services and construction act—title IV—basic grants to Indian tribes.	84.163A
Funds for this program provide reimbursement for the value of loan cancellations as prescribed by statute. The Department has no discretion in determining the amount of these reimbursements.		This program provides fellowships to individual Indian students to enable them to pursue studies at accredited colleges or institutions of higher education.		Exclusion Justification:	
Perkins direct student loan program.....	84.038	Vocational education Indian and Hawaiian Native Program.	84.101A	This program provides assistance to Federally recognized Indian tribes.	
Exclusion Justification:		Exclusion Justification:		Jacob Javits fellowship program.....	84.170
This program provides low-interest loans to both undergraduate and graduate students. This is a matching funds program with the institution contributing one-ninth of the project award. The annual allocation is distributed to participating institutions according to national and state funding formulas.		This program provides grants and contracts to federally recognized Indian tribal governments that are eligible to contract with the Secretary of the Interior for the administration of programs under the Indian Self-Determination Act or under the Act of April 16, 1934.		Exclusion Justification:	
School assistance in federally affected areas: Maintenance and operations.	84.041	Educational research and development.	84.117	This program provides fellowships to students of superior ability selected on the basis of demonstrated achievement and exceptional promise, for study at the doctoral level in selected fields of the arts, humanities, and the social sciences. Individuals apply directly to the Department and the calculated stipend is directly awarded to the fellow through the institution.	
Exclusion Justification:		Exclusion Justification:		Robert C. Byrd honors scholarship program.	84.185
This program makes financial payments to school districts. Funds under this program are distributed to participating local educational agencies that are affected by the presence of Federal activity or property, or by Presidentially-declared disasters. Once eligibility is established, the Department of Education has no discretion in approving sites or projects, or in determining allocation amounts.		This program is designed to provide grants and contracts to institutions of higher education, public and private non-profit organizations, and local and State educational agencies to support the conduct of educational research and development that is of national scope.		Exclusion Justification:	
National vocational education research program.	84.051	Handicapped American Indian vocational rehabilitation service projects.	84.128	This program provides financial assistance to States to award scholarships to individuals who have demonstrated outstanding academic achievement and who show promise of continued academic achievement. Funds are determined by a statutory formula and the Department has no discretion on amount of allocations.	
Exclusion Justification:		Exclusion Justification:		Adult education—national adult education discretionary program.	84.191
This program is designed to provide support to the National Center for Research in Vocational Education for which a location is chosen every five years: six curriculum development and demonstration centers; and several other contractors to engage in research and curriculum development and demonstration. Contracts may only be awarded to projects of national significance in vocational education and to develop and provide information to facilitate national planning and policy development.		This program is designed to provide vocational rehabilitation services solely to handicapped American Indians who reside on Federal or State reservations in order to prepare for suitable employment.		Projects funded under this program will be research based and national in scope. No specific state or region will be targeted.	
Pell grant program.....	84.063	National institute on disability and rehabilitation research.		Drug-free schools and communities—Hawaiian natives.	84.999c
Exclusion Justification:		Exclusion Justification:		Exclusion Justification:	
This program is a student financial assistance program based on a formula. Payments are made directly to individual students to pursue college or other postsecondary education goals.		The Institute provides financial support for research conducted by over 200 organizations throughout the United States and internationally and for scholarly exchange. Research priorities are based on areas of national scope such as spinal cord injury; physical restoration and psychosocial rehabilitation; and telecommunications. Therefore, they do not directly affect local areas or governments.		Funds under this program are awarded only to Hawaiian natives and the Department has no discretion in selecting recipients.	
Indian education—grants to Indian controlled schools.	84.072	Allen J. Ellender fellowship program.....	84.133	General assistance to the Virgin Islands.	No CFDA No.
Exclusion Justification:		Exclusion Justification:		Exclusion Justification:	
This program is designed to meet the special needs of Indian children. Single Points of Contact may not review applications submitted by Federally recognized Indian tribes. Other applicants under this program must submit applications to Single Points Of Contact for review as required by this Order.		As directed by Congress, the Close Up Foundation is the recipient of this contract which purpose is to enable economically disadvantaged students and their teachers to participate in a week long government studies program to increase their understanding of the Federal Government.		This grant is specifically mandated for the Virgin Islands by Section 1524 of PL 95-561.	
Arts in Education.....	84.084	Consolidation of Federal programs for elementary and secondary education.	84.151	Inexpensive book distribution.....	No CFDA No.
Exclusion Justification:		Funds under this program are distributed as block grants which are determined by a statutory formula and distributed to State educational agencies. The Department has no discretion in approving specific sites or in determining the amount of allocations.		Exclusion Justification:	
Legislation for this program identifies the two grantees: The Kennedy Center and the National Committee on Arts for the Handicapped and therefore, the Department has no funding discretion.		Handicapped special studies—State evaluation studies.	84.159	Grant recipient is designated in legislation.	

[FR Doc. 89-5535 Filed 3-10-89; 8:45 am]

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Testis Federal Register

Monday
March 13, 1989

Part IV

Department of Health and Human Services

National Institutes of Health

Recombinant DNA Research; Actions Under Guidelines; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

National Institutes of Health

Recombinant DNA Research: Actions Under Guidelines

AGENCY: National Institutes of Health, PHS, DHHS.

ACTION: Notice of actions under NIH guidelines for research involving recombinant DNA molecules.

SUMMARY: This notice sets forth three actions to be taken by the Director, National Institutes of Health (NIH), under the May 7, 1986, NIH Guidelines for Research Involving Recombinant DNA Molecules (51 FR 16958).

EFFECTIVE DATE: March 13, 1989.

FOR FURTHER INFORMATION CONTACT: Additional information can be obtained from Ms. Rachel E. Levinson, Office of Recombinant DNA Activities, Office of Science Policy and Legislation, National Institutes of Health, Building 31, Room B1C34, 9000 Rockville Pike, Bethesda, Maryland 20892, (301) 496-9838.

SUPPLEMENTARY INFORMATION: Today three actions are being promulgated under the NIH Guidelines for Research Involving Recombinant DNA Molecules. These three proposed actions were published for comment in the *Federal Register* of September 2, 1988 (53 FR 34246), and reviewed and recommended for approval by the NIH Recombinant DNA Advisory Committee (RAC) at its meeting on October 3, 1988. A transcript of that meeting is available from the Office of Recombinant DNA Activities at the address given above.

In accordance with Section IV-C-1-b of the NIH Guidelines, these actions have been found to comply with the NIH Guidelines and to present no significant risk to health or to the environment.

Part I of this announcement provides background information and decisions on the actions under the NIH Guidelines. Part II provides a summary of the actions. Part III provides a correction to a notice published in the *Federal Register* on October 26, 1988 (53 FR 43410).

I. Background Information and Decisions on Actions Under the NIH Guidelines

A. Human Gene Transfer Proposal

Three National Institutes of Health (NIH) intramural scientists, Dr. W. French Anderson, National Heart, Lung, and Blood Institute, and Drs. R. Michael Blaese and Steven A. Rosenberg, National Cancer Institute, have submitted a proposal involving transfer

of a bacterial gene coding for neomycin phosphotransferase into the cells of human patients. The gene is to be used as a marker to trace the path of "tumor infiltrating lymphocytes," or TIL, administered as part of an ongoing experimental cancer treatment.

The proposal was first received in June and July 1988, by a number of internal NIH review committees charged with oversight of the safety of proposed experiments. Concern for safety extends from the patients to the health care personnel and the researchers. The institutional review boards of the two sponsoring institutes and the NIH Institutional Biosafety Committee (IBC) all gave "conditional approval" with certain stipulations. Among these stipulations was a requirement that the Recombinant DNA Advisory Committee (RAC) grant its approval of the same procedure.

On July 29, 1988, the Human Gene Therapy Subcommittee of the Recombinant DNA Advisory Committee met to consider the gene transfer proposal and deferred approval pending receipt of additional data. This public meeting was announced in the *Federal Register* on June 24, 1988 (53 FR 23805). The Subcommittee provided specific questions to be answered by the investigators prior to the October 3, 1988, RAC meeting.

During a telephone conference on September 29, 1988, the Subcommittee members and consultants participating in the conference decided unanimously to defer approval of the proposal because the questions posed at the July 29, 1988, meeting had not yet been answered by the additional data which had been provided.

The October 3, 1988, public meeting of the RAC was announced in the September 2, 1988, *Federal Register* (53 FR 34246). At this meeting, the RAC received and discussed data not made available previously to the Human Gene Therapy Subcommittee. Based on these data, the RAC recommended that NIH approve this protocol by a vote of 16 in favor, 5 opposed, and no abstentions. In addition to the RAC review, I requested that the entire protocol, including data presented at the October 3, 1988, meeting and any additional data obtained since that date, be reviewed by the Subcommittee at its December 9, 1988, public meeting (53 FR 45591).

This request was duly carried out, and the Human Gene Therapy Subcommittee voted unanimously to approve the protocol by a vote of 12 in favor, none opposed, and no abstentions.

Following that meeting, the Office of Recombinant DNA Activities sent a mail ballot to RAC members, including the

motion approved by the Subcommittee and the minutes of the December 9, 1988, meeting of the Human Gene Therapy Subcommittee. The results of the ballot were 21 in favor, none opposed, 3 abstentions.

The motion approved by the Subcommittee and the RAC is as follows:

To approve the human gene transfer proposal submitted by Drs. Anderson, Blaese, and Rosenberg with the following stipulations:

1. There will be no more than 10 patients in the initial trial;
2. The patients selected will have a life expectancy of about 90 days;
3. The patients give fully informed consent to participate in the trial; and
4. The investigators will provide additional data before expanding the trial by adding patients or by inserting a gene for therapeutic purposes.

Points 1 through 3 of the motion were adopted by the RAC at the October 3, 1988, meeting. Point 4 of the motion was added by the Subcommittee on December 9, 1988, making explicit a policy that had been agreed upon at the October 3, 1988, RAC meeting.

Approval to implement this proposal has now been recommended by: The Clinical Research Subpanels of both sponsoring institutes, the NIH Institutional Biosafety Committee, the NIH Recombinant DNA Advisory Committee (RAC), the Human Gene Therapy Subcommittee of the RAC, and the Food and Drug Administration Vaccines and Related Biologic Products Advisory Committee.

Through data obtained in animal experiments, the investigators have demonstrated to the satisfaction of the above review committees that the use of amphotropically packaged retroviral vectors does not pose a public health risk to patients or to health care personnel, even in the event of accidental exposure to experimental material. Therefore, I have determined that this protocol does not present a risk to public health or to the environment.

After reviewing the relevant records and documentation, I accepted this recommendation, and approval to conduct this experiment has been given to Drs. Anderson, Blaese, and Rosenberg.

B. Amendment of Section I-C of the NIH Guidelines

Section I-C of the NIH Guidelines currently reads as follows:

The Guidelines are applicable to all recombinant DNA research within the United States or its territories which is conducted at or sponsored by an institution that receives any support for recombinant DNA research from the National Institutes of Health (NIH).

This includes research performed by the NIH directly.

An individual receiving support for research involving recombinant DNA must be associated with or sponsored by an institution that can and does assume the responsibilities assigned in these Guidelines.

The Guidelines are also applicable to projects done abroad if they are supported by NIH funds. If the host country, however, has established rules for the conduct of recombinant DNA projects, then a certificate of compliance with those rules may be submitted to NIH in lieu of compliance with the NIH Guidelines. The NIH reserves the right to withhold funding if the safety practices to be employed abroad are not reasonably consistent with the NIH Guidelines.

In a letter date January 9, 1987, Mr. Edward Lee Rogers, Counsel for the Foundation on Economic Trends, and Mr. Jeremy Rifkin, Foundation on Economic Trends, Washington, DC, proposed that the following text be inserted after the first sentence of the third paragraph of section I-C:

For purposes of the preceding sentence, the term 'project' includes any research or development of the recombinant organism or other product or process in question, including all such work that is reasonably foreseeable when the NIH support is received. NIH support includes both money grants and any type of in-kind support, including research conducted directly by NIH, supplies, equipment, the use of facilities, and biological research materials. NIH support has been given where the source of funds or in-kind support is, directly or indirectly, the NIH.

This proposed amendment of section I-C was initially published for comment in the *Federal Register* of March 11, 1987 (52 FR 7525), prior to a scheduled RAC meeting on June 15, 1987. The June 15, 1987, meeting was postponed and rescheduled on September 21, 1987. Accordingly, this proposed amendment was published again for comment in the *Federal Register* of August 11, 1987 (52 FR 29800).

After extensive discussion at its meeting on September 21, 1987, the RAC voted to establish a working group to make recommendations regarding international projects and to report back to the full RAC.

A Working Group on International Projects met at the NIH on February 1, 1988 (53 FR 808). After much discussion, the working group voted seven in favor, none opposed, and no abstentions that the following proposed revision of the last paragraph of Section I-C be published for comment:

The NIH Guidelines are also applicable: (1) To projects done abroad if they are supported by NIH funds, or (2) to research done abroad if it involves deliberate release into the environment or testing in humans of

materials containing recombinant DNA developed with NIH funds and the research is a direct extension of the development process. If the host country, however, has established rules for the conduct of recombinant DNA projects, then a written assurance of compliance with those rules may be submitted to NIH in lieu of compliance with the NIH Guidelines. Alternatively, if the host country does not have such rules, written acceptance by an appropriate government office of the host country is necessary in lieu of compliance with the NIH Guidelines. The NIH reserves the right to withhold funding if the safety practices to be employed abroad are not reasonably consistent with the NIH Guidelines.

After extensive discussion of this proposed amendment of Section I-C and attempts to draft revised language, the RAC recommended that the many issues raised be referred back to the working group for further consideration.

A Working Group on International Projects met at the NIH on August 15, 1988 (53 FR 27570). The working group recommended that the following proposed revision of the last paragraph of Section I-C be published for comment:

The NIH Guidelines are also applicable to recombinant DNA projects done abroad:

1. If they are supported by NIH funds; or
2. If they involve deliberate release into the environment or testing in humans of materials containing recombinant DNA developed with NIH funds, and if the institution that developed those materials sponsors or participates in those projects. Participation includes research collaboration or contractual agreements, but not mere provision of research materials.

If the host country has established rules for the conduct of recombinant DNA projects, then the project must be in compliance with those rules. If the host country does not have such rules, the proposed project must be reviewed by an NIH-approved IBC or equivalent review body and accepted in writing by an appropriate national governmental authority. The safety practices to be employed abroad must be reasonably consistent with the NIH Guidelines.

The proposed language was published for public comment in the *Federal Register* on September 2, 1988 (53 FR 34246). No comments were received in response to the notice. This language was reviewed at the October 3, 1988, RAC meeting and accepted with one modification. After the word "authority" in the final paragraph, the phrase "of the host country" was added. This motion passed unanimously by a vote of 20 in favor, none opposed, and no abstentions.

I accept these recommendations, and Section I-C has been amended accordingly.

C. Proposed Amendment of Section I-B

RAC member, Dr. Anne Vidaver of the University of Nebraska, proposed that the following paragraph regarding transposons be added to Section I-B, Definition of Recombinant DNA Molecules:

Unmodified transposons (wild-type) that become inserted into a genome, even if carried by a recombinant vector or plasmid, are not subject to these guidelines. For example, it is common to use vectors that either are naturally unstable (suicide vector) in a desired host or that can be rendered unstable by manipulating physiological conditions. In the process of suicide (inability of the vector to replicate), transposon transfer may occur. This process is not considered recombinant DNA.

Transposable genetic elements or transposons are mobile DNA segments that can insert into a few or several sites in a genome. Such insertions, unlike classical recombination events, do not require DNA sequence homology and are independent of recombination systems. Many transposons have been discovered in microorganisms and other organisms. They may be insertion sequences that do not carry genes related to a phenotype such as drug resistance, lactose or raffinose utilization, arginine biosynthesis, mercury resistance, or enterotoxin production. Transposable elements also include self-replicating elements such as the entire bacteriophage genomes of Mu and Psi.

This proposal appeared in the *Federal Register* on September 2, 1988 (53 FR 34246), for public comment. Two suggestions for modifying the proposed language were received and discussed at the October 3, 1988, RAC meeting.

A substitute motion was developed as follows:

Genomic DNA of plants and bacteria that has acquired a transposable element, even if the latter was donated from a recombinant vector no longer present, is not subject to these Guidelines unless the transposon itself contains recombinant DNA.

The motion to recommend approval of this modification to Section I-B of the Guidelines was passed by a vote of 18 in favor, none opposed, and no abstentions.

I accept this recommendation, and Section I-B of the Guidelines is amended accordingly.

II. Summary of Actions

A. Human Gene Transfer Proposal

The following section is added to Appendix D:

Appendix D-XIII

Drs. W. French Anderson, R. Michael Blaese, and Steven Rosenberg of the National Institutes of Health, Bethesda, Maryland, can conduct experiments in which a bacterial gene coding for neomycin phosphotransferase will be inserted into a portion of the tumor infiltrating lymphocytes (TIL) of cancer patients using a retroviral vector, N2. The marked TIL then will be combined with unmarked TIL, and reinfused into the patients. This experiment is an addition to an ongoing adoptive immunotherapy protocol in which TIL are isolated from a patient's tumor, grown in culture in the presence of interleukin-2, and reinfused into the patient. The marker gene will be used to detect TIL at various time intervals following reinfusion.

Approval is based on the following four stipulations:

1. There will be no more than 10 patients in the initial trial;
2. The patients selected will have a life expectancy of about 90 days;
3. The patients give fully informed consent to participate in the trial; and
4. The investigators will provide additional data before expanding the trial by adding patients or by inserting a gene for therapeutic purposes.

B. Amendment of Section I-C of the NIH Guidelines

Section I-C of the Guidelines is modified to read as follows:

The Guidelines are applicable to all recombinant DNA research within the United States or its territories which is conducted at or sponsored by an institution that receives any support for recombinant DNA research from the National Institutes of Health (NIH). This includes research performed by NIH directly.

An individual receiving support for research involving recombinant DNA must be associated with or sponsored by an institution that can and does assume the responsibilities assigned in these Guidelines.

The NIH Guidelines are also applicable to recombinant DNA projects done abroad:

1. If they are supported by NIH funds; or
2. If they involve deliberate release into the environment or testing in humans of materials containing recombinant DNA developed with NIH funds, and if the institution that developed those materials

sponsors or participates in those projects. Participation includes research collaboration or contractual agreements, but not mere provision of research materials.

If the host country has established rules for the conduct of recombinant DNA projects, then the project must be in compliance with those rules. If the host country does not have such rules, the proposed project must be reviewed by an NIH-approved IBC or equivalent review body and accepted in writing by an appropriate national governmental authority of the host country. The safety practices to be employed abroad must be reasonably consistent with the NIH Guidelines.

C. Proposed Amendment of Section I-B

Section I-B is modified to read as follows:

In the context of these Guidelines recombinant DNA molecules are defined as either (i) molecules which are constructed outside living cells by joining natural or synthetic DNA segments to DNA molecules that can replicate in a living cell, or (ii) DNA molecules that result from the replication of those described in (i) above.

Synthetic DNA segments likely to yield a potentially harmful polynucleotide or polypeptide (e.g., a toxin or a pharmacologically active agent) shall be considered as equivalent to their natural DNA counterpart. If the synthetic DNA segment is not expressed in vivo as a biologically active polynucleotide or polypeptide product, it is exempt from the Guidelines.

Genomic DNA of plants and bacteria that has acquired a transposable element, even if the latter was donated from a recombinant vector no longer present, is not subject to these Guidelines unless the transposon itself contains recombinant DNA.

III. Correction to Notice of Actions Published in the Federal Register on October 26, 1988 (53 FR 43410)

Two phrases were inadvertently dropped from Part II., D. Revision of Appendix C-IV. Appendix C-IV should read as follows:

Any asporogenic *Bacillus subtilis* or asporogenic *Bacillus licheniformis* strain

which does not revert to a sporeformer with a frequency greater than 10, can be used for cloning DNA with the exception of those experiments listed below.

For these exempt laboratory experiments, BL1 physical containment conditions are recommended.

For large-scale (LS) fermentation experiments, the appropriate physical containment conditions need be no greater than those for the host organism unmodified by recombinant DNA techniques; the IBC can specify higher containment if it deems necessary.

OMB's "Mandatory Information Requirements for Federal Assistance Program Announcements" (45 FR 39592) requires a statement concerning the official government programs contained in the *Catalog of Federal Domestic Assistance*. Normally NIH lists in its announcements the number and title of affected individual programs for the guidance of the public. Because the guidance in this notice covers not only virtually every NIH program but also essentially every Federal research program in which DNA recombinant molecule techniques could be used, it has been determined to be not cost effective or in the public interest to attempt to list these programs. Such a list would likely require several additional pages. In addition, NIH could not be certain that every Federal program would be included as many Federal agencies, as well as private organizations, both national and international, have elected to follow the NIH Guidelines. In lieu of the individual program listing, NIH invites readers to direct questions to the information address above about whether individual programs listed in the *Catalog of Federal Domestic Assistance* are affected.

Dated: March 2, 1989.
James B. Wyngaarden,
Director, National Institutes of Health.
[FR Doc. 89-5674 Filed 3-10-89; 8:45 am]
BILLING CODE 4140-01-M

Environmental Protection Agency

**Monday
March 13, 1989**

Part V

Environmental Protection Agency

40 CFR Part 300

**National Priorities List for Uncontrolled
Hazardous Sites; Final Federal Facility
Site Update; Final Rule**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3533-8]

National Priorities List for Uncontrolled Hazardous Waste Sites; Final Federal Facility Site Update

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

SUMMARY: The Environmental Protection Agency ("EPA") is amending the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list and is being revised today by the addition of eight Federal facility sites to the Federal section of the NPL, the expansion of two Federal facility sites already on the NPL, and the reclassification of one site already on the NPL to a Federal facility site. EPA has reviewed public comments on the listing of these sites and has decided that they meet the eligibility requirements and listing policies of the NPL. Information supporting these actions is contained in the Superfund Public Dockets. Elsewhere in today's **Federal Register** is a notice describing the policy under which some of these Federal facility sites are being added to the NPL. This rule results in a final NPL of 799 sites, 41 of them in the Federal section; 370 sites are proposed to the NPL, 22 of them in the Federal section. Final and proposed sites now total 1,169.

EFFECTIVE DATE: The effective date for this amendment to the NCP shall be April 12, 1989. CERCLA section 305 provides for a legislative veto of regulations promulgated under CERCLA. Although *INS v. Chadha*, 462 U.S. 919, 103 S. Ct. 2764 (1983), cast the validity of the legislative veto into question, EPA has transmitted a copy of this regulation to the Secretary of the Senate and the

Clerk of the House of Representatives. If any action by Congress calls the effective date of this regulation into question, the Agency will publish a notice of clarification in the **Federal Register**.

ADDRESSES: Addresses for the Headquarters and Regional dockets follows. For further details on what these dockets contain, see section I of the "Supplementary Information" portion of this preamble.

Tina Maragousis, Headquarters, U.S. EPA CERCLA Docket Office, Waterside Mall, 401 M Street SW., Washington, DC 20460, 202/382-3046.
Evo Cunha, Region 1, U.S. EPA Waste Management Records Center, HES-CAN 6, J.F. Kennedy Federal Building, Boston, MA 02203, 617/565-3300.
U.S. EPA, Region 2, Document Control Center, Superfund Docket, 26 Federal Plaza, 7th Floor, Room 740, New York, NY 10278, Latchmin Serrano, 212/264-5540, Ophelia Brown, 212/264-1154.
Diane McCreary, Region 3, U.S. EPA Library, 5th Floor, 841 Chestnut Building, 9th & Chestnut Streets, Philadelphia, PA 19107, 215/597-0580.
Gayle Alston, Region 4, U.S. EPA Library, Room G-6, 345 Courtland Street NE., Atlanta, GA 30365, 404/347-4216.
Cathy Freeman, Region 5, U.S. EPA, 5 HS-12, 230 South Dearborn Street, Chicago, IL 60604, 312/886-6214.
Deborah Vaughn-Wright, Region 6, U.S. EPA, 1445 Ross Avenue, Mail Code 6H-MA, Dallas, TX 75202-2733, 214/655-6740.
Connie McKenzie, Region 7, U.S. EPA Library, 726 Minnesota Avenue, Kansas City, KS 66101, 913/236-2828.
Dolores Eddy, Region 8, U.S. EPA Library, 999 18th Street, Suite 500, Denver, CO 80202-2405, 303/293-1444.
Linda Sunnen, Region 9, U.S. EPA Library, 6th Floor, 215 Fremont Street, San Francisco, CA 94105, 415/974-8082.
David Bennett, Region 10, U.S. EPA, 9th Floor, 1200 6th Avenue, Mail Stop HW-093, Seattle, WA 98101, 206/442-2103.

FOR FURTHER INFORMATION CONTACT: Joseph Kruger, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response (OS-230), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC, 20460, or the Superfund Hotline, Phone (800) 424-9346 (382-3000 in the Washington, DC, metropolitan area).

SUPPLEMENTARY INFORMATION:

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I. Introduction

Background
In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601-9657 ("CERCLA" or the "Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, stat. 1613 *et seq.* To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180) pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases or threatened releases of hazardous substances, pollutants, or contaminants. On December 21, 1988 (53 FR 51394), EPA proposed revisions to the NCP in response to SARA.

Section 105(a)(8)(A) of CERCLA, as amended by SARA, requires that the NCP include criteria for determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable, take into account the potential urgency of such action for the purpose of taking removal action. In response to that mandate, EPA developed a model for assessing the relative risk posed by sites (the "Hazard Ranking System" or "HRS").

Section 105(a)(8)(B) of CERCLA, as amended by SARA, requires that the statutory criteria provided by the HRS be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). Section 105(a)(8)(B) also requires that the NPL be revised at least annually.

An original NPL of 406 sites was promulgated on September 8, 1983 (48 FR 40658). The NPL has been expanded since then, most recently on July 22, 1987 (52 FR 27620). The Agency has also

published a number of proposed rulemakings to add sites to the NPL, most recently Update #7 on June 24, 1988 (53 FR 23988). EPA announced on June 10, 1988 (51 FR 21056), that it would list Federal facility sites in a separate section of the NPL, using the same technical criteria that qualify non-Federal sites.

EPA may delete sites from the NPL when no further response is appropriate, as provided in the NCP at 40 CFR 300.66(c)(7). To date, the Agency has deleted 24 sites from the NPL, 8 of them since the June 1988 proposed rule. They are:

- September 1, 1988 (53 FR 33811)
—Tri-City Oil Conservationist, Inc., Tampa, Florida
- Varsol Spill (once listed as part of Biscayne aquifer), Miami, Florida
- December 23, 1988 (53 FR 51780)
—Toftdahl Drums, Brush Prairie, Washington
- January 19, 1989 (54 FR 2124)
—Matthews Electroplating, Roanoke County, Virginia
- February 13, 1989 (54 FR 6521)
—Presque Isle, Erie, Pennsylvania
- February 21, 1989 (54 FR 7424)
—Parramore Surplus, Mount Pleasant, Florida
- February 22, 1989 (54 FR 7548)
—Cooper Road, Voorhees Township, New Jersey
- February 22, 1989 (54 FR 7549)
—Krysowaty Farm, Hillsborough, New Jersey.

EPA has also published several notices of intent to delete sites.

This rule adds eight Federal facility sites to the NPL, expands two Federal facility sites, and reclassifies one private site to a Federal facility site. EPA has carefully considered public comments submitted for the sites in today's final rule. This rule results in a final NPL of 799 sites, 41 of them in the Federal section; 370 sites are in proposed status, 22 of them in the Federal section. With these changes, final and proposed sites now total 1,169.

EPA includes on the NPL sites at which there are or have been releases or threatened releases of hazardous substances, pollutants, or contaminants. The discussion below may refer to "releases or threatened releases" simply as "releases", "facilities", or "sites".

Information Available to the Public

The Headquarters and Regional public dockets for the NPL (see ADDRESSES portion of this notice) contain documents relating to the scoring of sites in this final rule. The dockets are available for viewing "by appointment only" after the appearance of this

notice. The hours of operation for the Headquarters dockets are from 9:00 a.m. to 4:00 p.m., Monday through Friday excluding Federal holidays. Please contact individual Regional dockets for hours.

The Headquarters docket contains HRS score sheets for each final site, a Documentation Record for each site describing the information used to compute the score, pertinent information for any site affected by special study waste, information for sites affected by the policy for listing sites subject to the Surface Mining Control and Reclamation Act of 1977 (SMCRA), a list of documents referenced in the Documentation Record, comments received, and the Agency's response to those comments. The Agency's responses are contained in the "Support Document for the Revised National Priorities List—Final Federal Facility Site Update, March 1989."

Each Regional docket includes all information available in the Headquarters docket for sites in that Region, as well as the actual reference documents, which contain the data EPA relied upon in calculating or evaluating the HRS scores for sites in the Region. These reference documents are available only in the Regional dockets. They may be viewed "by appointment only" in the appropriate Regional Docket or Superfund Branch office. Requests for copies may be directed to the appropriate Regional docket or Superfund Branch.

An informal written request, rather than a formal request, should be the ordinary procedure for obtaining copies of any of these documents.

EPA has published a statement describing what background information (resulting from the initial investigation of potential CERCLA sites) the Agency discloses in response to Freedom of Information Act requests (52 FR 5576, February 25, 1987).

II. Purpose and Implementation of the NPL

Purpose

The primary purpose of the NPL is stated in the legislative history of CERCLA (Report of the Committee on Environment and Public Works, Senate Report No. 96-848, 96th Cong., 2d Sess. 60 (1980)):

The priority lists serve primarily informational purposes, identifying for the States and the public those facilities and sites or other releases which appear to warrant remedial actions. Inclusion of a facility or site on the list does not in itself reflect a judgment of the activities of its owner or operator. It does not require those persons to undertake any action, nor does it assign liability to any

person. Subsequent government action in the form of remedial actions or enforcement actions will be necessary in order to do so, and these actions will be attended by all appropriate procedural safeguards.

The purpose of the NPL, therefore, is primarily to serve as an informational and management tool. The initial identification of a site for the NPL is intended primarily to guide EPA in determining which sites warrant further investigation to assess the nature and extent of the public health and environmental risks associated with the site and to determine what CERCLA-financed remedial action(s), if any, may be appropriate. The NPL also serves to notify the public of sites EPA believes warrant further investigation.

Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2). However, section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of CERCLA monies at Federally-owned facilities. Federal facility sites are also subject to the requirements of CERCLA section 120, added by SARA.

Placing Sites on the NPL

There are three mechanisms for placing sites on the NPL. The principal mechanism is the application of the HRS. The HRS serves as a screening device to evaluate the relative potential of uncontrolled hazardous substances to cause human health or safety problems, or ecological or environmental damage. The HRS score is calculated by estimating risks presented in three potential "pathways" of human or environmental exposure: Ground water, surface water, and air. Within each pathway of exposure, the HRS considers three categories of factors "that are designed to encompass most aspects of the likelihood of exposure to a hazardous substance through a release and the magnitude or degree of harm from such exposure": (1) Factors that indicate the presence or likelihood of a release to the environment; (2) factors that indicate the nature and quantity of the substances presenting the potential threat; and (3) factors that indicate the human or environmental "targets" potentially at risk from the site. Factors within each of these three categories are assigned a numerical value according to a set scale. Once numerical values are computed for each factor, the HRS uses mathematical formulas that reflect the relative importance and interrelationships of the various factors to arrive at a final site score on a scale of 0 to 100. The resultant HRS score represents an estimate of the relative "probability and magnitude of harm to

the human population or sensitive environment from exposure to hazardous substances as a result of the contamination of ground water, surface water, or air" (47 FR 31180, July 16, 1982). Those sites that score 28.50 or greater on the HRS are eligible for the NPL.

Under the second mechanism for adding sites to the NPL, each State may designate a single site as its top priority, regardless of the HRS score. This mechanism is provided by section 105(a)(8)(B) of CERCLA, as amended by SARA, which requires that, to the extent practicable, the NPL include within the 100 highest priorities, one facility designated by each State representing the greatest danger to public health, welfare, or the environment among known facilities in the State.

The third mechanism for listing, included in the NCP at 40 CFR 300.66(b)(4) (50 FR 37624, September 16, 1985), has been used only in rare instances. It allows certain sites with HRS scores below 28.50 to be eligible for the NPL if all of the following occur:

- The Agency for Toxic Substances and Disease Registry of the U.S. Department of Health and Human Services has issued a health advisory which recommends dissociation of individuals from the release.
- EPA determines that the release poses a significant threat to public health.
- EPA anticipates that it will be more cost-effective to use its remedial authority than to use its removal authority to respond to the release.

All sites in this update are being included on the NPL based on HRS scores.

Federal agencies have the primary responsibility under CERCLA section 120(c) for identifying Federal facility sites. In conjunction with EPA Regional Offices, the Federal agencies perform investigations, sampling, monitoring, and scoring of sites. Regional Offices then conduct a quality control review of the candidate sites. EPA Headquarters conducts further quality assurance audits to ensure accuracy and consistency among the various offices participating in the scoring. The Agency then proposes the sites that meet one of the three eligibility criteria for listing (and EPA's listing policies) and solicits public comment on the proposal. Based on these comments and further review by EPA, the Agency determines final HRS scores and lists those sites that still qualify for the final NPL.

In response to CERCLA section 105(c), as amended by SARA, EPA has proposed revisions to the HRS (53 FR

51962, December 23, 1988). EPA intends to issue the revised HRS as soon as possible. However, until the proposed revisions have been subject to public comment and put into effect, EPA will continue to propose and promulgate sites using the current HRS, in accordance with CERCLA section 105(c)(1) and Congressional intent, *see, e.g.,* S. Rep. No. 11, 99th Cong., 1st Sess. 41 (1985); 131 Cong. Rec. S-11681 (daily ed., Sept. 18, 1985) (statement of Sen. Baucus).

III. Statutory Requirements and Listing Policies

CERCLA restricts EPA's authority to respond to certain categories of releases of hazardous substances, pollutants, or contaminants by expressly excluding some substances, such as petroleum, from the response program. In addition, CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases. For example, EPA has chosen not to list sites that result from contamination associated with facilities licensed by the Nuclear Regulatory Commission (NRC), on the grounds that NRC has the authority and expertise to clean up releases from those facilities (48 FR 40661, September 8, 1983). Where other authorities exist, placing the site on the NPL for possible remedial action under CERCLA may not be appropriate. Therefore, EPA has chosen to defer certain types of sites from the NPL even though CERCLA may provide authority to respond. If, however, the Agency later determines that sites not listed as a matter of policy are not being properly responded to, the Agency may place them on the NPL.

In the proposed revisions to the NCP (53 FR 51394, December 21, 1988), the Agency is considering extending the deferral policy, under certain circumstances, to include other Federal authorities and States that have corrective action authority. The Agency is also considering extending the policy to sites where the potentially responsible parties enter into enforcement agreements for site cleanup under CERCLA. EPA notes that even if another authority is applicable to Federal facilities, the cleanup of such sites will not be deferred, and Federal Facilities will continue to be included in the NPL, consistent with CERCLA section 120(d)(2).

Releases from Federal Facility Sites

On June 10, 1986 (51 FR 21054), the Agency announced a decision on components of a policy for generally deferring from listing those non-Federal sites that are subject to Subtitle C of the Resource Conservation and Recovery Act (RCRA). The policy was intended to reflect RCRA's broadened corrective action authorities as a result of the Hazardous and Solid Waste Amendments of 1984 (HSWA). In announcing the RCRA policy, the Agency reserved for a later date the question of whether this or another policy would be applied to Federal facility sites that include one or more RCRA hazardous waste management units, and thus are subject to RCRA Subtitle C corrective action authorities.

On May 13, 1987 (52 FR 17991), the Agency announced its intent to adopt a policy that would allow Federal facility sites to be placed on the NPL regardless of whether RCRA Subtitle C corrective action authorities are applicable.

Elsewhere in today's *Federal Register* is a notice describing the policy for placing on the NPL those sites located on Federally-owned or -operated facilities that meet the eligibility criteria (e.g., HRS score of 28.50 or greater) set out in the NCP for listing on the NPL, even if the Federal facility is also subject to the corrective action authorities of RCRA Subtitle C. Thus the June 10, 1986 RCRA deferral policy (51 FR 21057), applicable to private sites, will not be applied to Federal facility sites.

The Agency believes that placing Federal facility sites with or without RCRA-regulated hazardous waste management units on the NPL is consistent with the intent of section 120 of SARA and will serve the purposes originally intended by the NCP at 40 CFR 300.66(e)(2)—to advise the public of the status of Federal Government cleanup efforts (50 FR 47931, November 20, 1985). In addition, listing will help other Federal agencies set priorities and focus cleanup efforts on those sites presenting the most serious problems.

Releases from Special Study Wastes and Mining Sites

Section 105(g) of CERCLA, as amended by SARA, requires additional information before sites involving RCRA "special study wastes" can be added to the NPL (53 FR 23992, June 24, 1988). One of the sites being expended in this rule (Weldon Spring Quarry/Plant/Pits) involves such wastes. The same site also involves mining wastes, which are addressed under a SMCRA applicability

policy also explained on June 24, 1988 (53 FR 23993). A memorandum has been placed in the docket addressing the application of the special study waste and SMCRA policies to this site.

IV. Disposition of Sites in Today's Final Rule

This final rule adds eight Federal facility sites to the Federal facility

section of the NPL (Table I), finalizes the expansion of two Federal facility sites already on the NPL, and reclassifies one site already on the NPL to a Federal facility site.

TABLE I.—NATIONAL PRIORITIES LIST, FEDERAL FACILITY SITES, NEW FINAL (BY GROUP) MARCH 1989

NPL Gr ¹	St	Site Name	City/County	Response category ²	Cleanup status ³
1	NM	Cal West Metals (USSBA).....	Lemitar.....	D.....	
4	AL	Anniston Army Depot (SE Ind Area).....	Anniston.....	R.....	I
7	IL	Savanna Army Depot Activity.....	Savanna.....	R.....	
9	PA	Letterkenny Army Depot (PDO Area).....	Franklin County.....	R.....	
10	DE	Dover Air Force Base.....	Dover.....	R.....	I
11	IL	Joliet Army Ammu Plant (LAP Area).....	Joliet.....	R.....	
13	WA	Fairchild Air Force Base (4 Areas).....	Spokane County.....	R.....	
15	LA	Louisiana Army Ammunition Plant.....	Doyline.....	R.....	

Number of New Final Federal Facility Sites: 8.

¹ Sites are placed in groups (Gr) corresponding to groups of 50 on the final NPL.

² V=Voluntary or negotiated response; R=Federal and State response; F=Federal enforcement; S=State enforcement; D=Category to be determined.

³ I=Implementation activity underway, one or more operable units; O=One or more operable units completed; others may be underway; C=Implementation activity completed for all operable units.

New Final Sites

The eight new Federal facility sites in today's final rule are subject to the corrective action authorities of RCRA Subtitle C. EPA is placing these sites on the NPL consistent with the listing policy for Federal facilities, described elsewhere in today's Federal Register. They include six sites repropoed for the NPL on July 22, 1987 (52 FR 27643), and two sites proposed on June 24, 1988 (53 FR 23988). The Agency received comments on two of the sites repropoed on July 22, 1987; no comments were received on the remaining six sites.

The Agency received technical comments on the proposal to list the Letterkenny Army Depot (Property Disposal Office Area), Franklin County, Pennsylvania, and the Anniston Army Depot (Southeast Industrial Area), Anniston, Alabama. EPA's response to these comments is discussed in the "Support Document for the Revised National Priorities List—Final Federal Facility Site Update, March 1989" which is available in the appropriate Superfund Dockets.

Site Expansions

The Agency is finalizing two site expansions in this rule, the expansion of the Rocky Mountain Arsenal (RMA) site in Denver, Colorado, to include Basin F, a 93-acre lagoon on the site, and the expansion of the Weldon Spring Quarry (USDOE/Army) site in St. Charles County, Missouri, to include the Weldon Spring Feed Materials plant and Raffinate Pits.

The approach of expanding a site to include a contiguous area that is contributing to a contamination

problem, rather than proposing a second separate site, is within the Agency's authority and is consistent with past practice. For instance, in the first NPL proposal on December 30, 1982 (47 FR 58476), EPA proposed to list a 28-mile stream bed (the "Silver Bow Creek site"), and finalized that site on September 8, 1983 (48 FR 40658). The Agency then proposed on June 10, 1986 (51 FR 21101) to expand the site to include an additional area which EPA determined to be significantly contributing to the contamination; the Silver Bow Creek expansion was finalized on July 22, 1987 (52 FR 27627). EPA has broad authority to address contamination, as reflected in CERCLA section 104(d)(4), which allows the Agency to treat related, noncontiguous facilities as one for the purpose of remedial action, and in CERCLA section 101(9), which defines a "facility" under CERCLA to include any site or area where a hazardous substance has been placed or "come to be located."

The Agency received comments from one party opposing the proposal to expand the RMA site; EPA had proposed this expansion on July 22, 1987 (52 FR 27643) when the RMA site was added to the final NPL. EPA believes that it is appropriate to include Basin F in the RMA listing.

Basin F is located on section 36 of the approximately 40 designated land sections at the RMA property. The RMA/NPL site, as originally listed, includes the bulk of the Arsenal property, and indeed physically surrounds the Basin F area. EPA has identified Basin F as a major source of ground water contamination which mixes with ground water contamination from other sources at the Arsenal,

making coordinated response necessary. Basin F also represents a major source of surface contamination, although that situation is being addressed by a CERCLA interim response action at Basin F. The Agency believes that the site definition for RMA should be expanded to include Basin F so that EPA will have the option of seeking a comprehensive remedy under CERCLA for contamination at the contiguous areas of Basin F and the original RMA/NPL site.¹

Basin F was excluded from the RMA site (as initially proposed and promulgated) because EPA believed that Basin F might be subject to RCRA Subtitle C corrective action authorities, and thus might be appropriate for deferral under the Agency's September 8, 1983 NPL/RCRA policy (48 FR 40662 and further discussed at 49 FR 40323-40324, 40336 (October 15, 1984)). EPA subsequently learned that Basin F should not, in fact, have been deferred to RCRA based on the policy in effect when RMA was proposed for listing.²

¹ In the case of the Basin F expansion, a non-contiguous site expansion analysis is not technically required. Information developed during the course of the remedial investigation/feasibility study confirms that contamination extends from the original RMA/NPL site to the Basin F area. This provides an additional basis for including Basin F within the original NPL site at RMA, because the statute provides that a CERCLA "facility" includes the site or area where hazardous substances have "come to be located" (CERCLA section 101(9)). The definition of a "site," reflected by the original HRS listing package, is continually refined as the CERCLA process progresses and more information on the extent of contamination is developed.

² Basin F stopped receiving RCRA hazardous wastes prior to July 26, 1982 (the effective date of the land disposal regulations) and did not certify closure prior to January 26, 1983; thus, it was not

Continued

Rather, it should have been included in the original RMA site under the 1983 policy.

Basin F also qualifies for listing under the current policy. Passage of HSWA in 1984 gave the Agency additional authorities under RCRA to order corrective action at all units at a RCRA facility, including those that were known as "non-regulated" units; thus, on June 10, 1986 (51 FR 21057), the Agency announced a revised NPL/RCRA policy which provided for the deferral from listing of certain RCRA sites where corrective action authorities are available (again, including sites with non-regulated units). However, that revised policy applied only to non-Federal facility sites, and thus not to Basin F. Thus, the June 1986 revised policy did not supersede the September 1983 RCRA listing policy with respect to Federal facilities. On May 13, 1987 (52 FR 17991-17993), the Agency asked for comment on a policy for listing Federal sites regardless of RCRA applicability, and on July 22, 1987 (52 FR 27645-27646), the Agency discussed that policy with specific application to Basin F. Elsewhere in today's *Federal Register*, the Agency formally announced its policy of listing Federal facility sites on the NPL, even if they are also subject to RCRA authorities, as generally discussed in the May and July 1987 notices. Thus, Basin F is appropriate for inclusion in the NPL site under current Agency policy.

Further specific comments concerning the expansion of the RMA site are discussed in the Support Document for this rule, which is available in the Superfund docket.

The second Federal facility site being expanded in this rule is the Weldon Spring Quarry (USDOE/Army), St. Charles County, Missouri. It was placed on the final NPL on July 22, 1987 (52 FR 27620). On June 24, 1988, EPA proposed to expand the site to include the Weldon Spring Feed Materials Plant and Raffinate Pits, which are located less than 3 miles from the Quarry and are linked to the contamination at the original site. The site contains mining wastes from uranium ore processing; an addendum discussing special study wastes at the site is included in the Superfund dockets. In addition, the site was abandoned prior to the August 3, 1977 enactment of the Surface Mining Control and Reclamation Act of 1977 ("SMCRA"). Consistent with the policy for listing SMCRA sites on the NPL, a

statement covering SMCRA applicability at the site is included in the dockets. No comments were received on the proposed expansion of this site, or on the special study waste and SMCRA addenda. The expanded site is now being placed on the final NPL under the name "Weldon Spring Quarry/Plant/Pits (USDOE/Army)".

Site Reclassification

Finally, this rule reclassifies one site—W. R. Grace Co., Inc. (Wayne Plant), Wayne, New Jersey—as a Federal facility site; that site had been proposed for the NPL on September 8, 1983 (48 FR 40674). W.R. Grace Co., Inc., bought the facility in 1957 and owned it until September 18, 1984, when the facility was acquired by the U.S. Department of Energy (USDOE). USDOE changed the name of the site to the Wayne Interim Storage Site (WISS). On September 21, 1984 (49 FR 37070), the site was placed on the final NPL under its original name. The site will now be included in the Federal facility section of the NPL. The site name is being changed to "W. R. Grace & Co., Inc./Wayne Interim Storage Site (USDOE)" to more accurately reflect the ownership and status of the site.

V. Contents of the NPL

The eight new sites added to the NPL in today's rule (Table 1) and the one reclassified site have been incorporated into the Federal section of the NPL by their group number. Sites on the NPL are arranged according to their HRS scores and presented in groups of 50 sites to emphasize that minor differences in HRS scores do not necessarily represent significantly different levels of risk. EPA considers the sites within a group to have approximately the same priority for response actions. The Federal facility section appears at the end of this final rule, and will be codified as part of Appendix B to the NCP.

Each entry on the NPL contains the name of the facility and the State and city or county in which it is located. For informational purposes, each entry is accompanied by one or more notations reflecting the status of response and cleanup activities at these sites at the time this list was prepared. Because this information may change periodically, these notations may become outdated.

VI. Regulatory Impact Analysis

The costs of cleanup actions that may be taken at sites are not directly attributable to placement on the NPL, as explained below. Therefore, the Agency has determined that this rulemaking is not a "major" regulation under Executive Order 12291. EPA has

conducted a preliminary analysis of economic implications of today's amendment to the NCP. EPA believes that the kinds of economic effects associated with this revision are generally similar to those effects identified in the regulatory impact analysis (RIA) prepared in 1982 for the revisions to the NCP pursuant to section 105 of CERCLA and the economic analysis prepared when amendments to the NCP were proposed (50 FR 5882, February 12, 1985). The Agency believes the anticipated economic effects related to adding eight sites to the NPL can be characterized in terms of the conclusions of the earlier RIA and the most recent economic analysis. This rule was submitted to the Office of Management and Budget for review as required by Executive Order 12291.

Costs

EPA has determined that this rulemaking is not a "major" regulation under Executive Order 12291 because inclusion of a site on the NPL does not itself impose any costs. It does not establish that EPA will necessarily undertake remedial action, nor does it require any action by a private party or determine its liability for site response costs. Costs that arise out of site responses result from site-by-site decisions about what actions to take, not directly from the act of listing itself. In addition, all sites in this final rule are Federally-owned or -operated, and CERCLA section 111(e)(3) prohibits use of the Trust Fund for remedial actions at Federal facilities.

Benefits

The real benefits associated with today's amendment placing additional sites on the NPL are increased health and environmental protection as a result of increased public awareness of potential hazards.

As a result of the additional CERCLA remedies, there will be lower human exposure to high-risk chemicals, and higher-quality surface water, ground water, soil, and air. These benefits are expected to be significant, although difficult to estimate in advance of the remedial investigation/feasibility study of each site. Associated with the costs are significant potential benefits and cost offsets. The distributional costs of carrying out remedies at sites on the NPL have corresponding "benefits" in that funds expended for a response generate employment, directly or indirectly (through purchased materials).

subject to RCRA corrective action requirements available at that time, and qualified as a "non-regulated unit." It was not appropriate for deferral to RCRA under the September 1983 policy.

VII. Regulatory Flexibility Act Analysis

The Regulatory Flexibility Act of 1980 requires EPA to review the impacts of this action on small entities, or certify that the action will not have a significant impact on a substantial number of small entities. By small entities, the Act refers to small businesses, small government jurisdictions, and nonprofit organizations.

While modifications to the NPL are considered revisions to the NCP, they are not typical regulatory changes since the revisions do not automatically impose costs. The placing of sites on the NPL does not in itself require any action of any party, (e.g., contractors operating government-owned facilities), nor does

it determine the liability of any party for the cost of cleanup at the site. Further, because this final rule involves Federally-owned or -operated facilities, the number of small entities that could be affected will be small.

The impacts (from cost recovery) on small governments and nonprofit organizations would be determined on a similar case-by-case basis.

List of Subjects in 40 CFR Part 300

Air pollution control, Chemicals, Hazardous materials, Intergovernmental relations, Natural resources, Oil pollution, Reporting and recordkeeping requirements, Superfund, Waste treatment and disposal, Water pollution control, Water supply.

Date: March 6, 1989.

Jonathan Z. Cannon,

Acting Assistant Administrator, Office of Solid Waste and Emergency Response.

40 CFR Part 300 is amended as follows:

PART 300—[AMENDED]

1. The authority citation for Part 300 is revised to read as follows:

Authority: 42 U.S.C. 9605; 42 U.S.C. 9620; 33 U.S.C. 1321 (c)(2); E.O. 11735 (38 FR 21243); E.O. 12580, (52 FR 2923).

2. In Appendix B of Part 300, the Federal Section (by group) table is revised to read as set forth below.

Appendix B

* * * * *

NATIONAL PRIORITIES LIST, FEDERAL SECTION (BY GROUP)

March 1989

NPL Gr ¹	St	Site Name	City/County	Response category ²	Cleanup status ³
1	NM	Cal West Metals (USSBA)	Lemitar	D	
1	MO	Weldon Spring (USDOE/Army)	St. Charles County	R	
2	CO	Rocky Mountain Arsenal	Adams County	R	O
2	TN	Milan Army Ammunition Plant	Milan	R	I
2	CA	McClellan AFB (Ground Water Cont)	Sacramento	R	O
4	AL	Anniston Army Depot (SE Ind Area)	Anniston	R	I
4	GA	Robins AFB (Lndfil #4/Sludge Lag)	Houston County	R	
4	NE	Cornhusker Army Ammunition Plant	Hall County	R	O
4	NJ	Naval Air Engineering Center	Lakehurst	R	
4	UT	Hill Air Force Base	Ogden	R	I
5	NJ	W.R. Grace/Wayne Int Stor (USDOE)	Wayne Township	R	O
6	UT	Ogden Defense Depot	Ogden	R	
6	CA	Sacramento Army Depot	Sacramento	R	
6	IL	Sangamo/Crab Orchard NWR (USDOL)	Carterville	R	
6	ME	Brunswick Naval Air Station	Brunswick	V R	
7	CA	Lawrence Livermore Lab (USDOE)	Livermore	R	O
7	CA	Sharpe Army Depot	Lathrop	R	O
7	OK	Tinker AFB (Soldier Cr/Bldg 3001)	Oklahoma City	R	
7	WA	McChord AFB (Wash Rack/Treatment)	Tacoma	R	
7	IL	Savanna Army Depot Activity	Savanna	R	
8	CA	Norton Air Force Base	San Bernardino	R	
9	CA	Castle Air Force Base	Merced	R	I
9	PA	Letterkenny Army Depot (PDO Area)	Franklin County	R	
9	NJ	Fort Dix (Landfill Site)	Pemberton Township	R	
10	AL	Alabama Army Ammunition Plant	Childersburg	R	O
10	DE	Dover Air Force Base	Dover	R	I
11	IL	Joliet Army Ammu Plant (LAP area)	Joliet	R	
12	PA	Letterkenny Army Depot (SE Area)	Chambersburg	R	O
12	NY	Griffiss Air Force Base	Rome	R	
12	VA	Defense General Supply Center	Chesterfield County	R	O
12	WA	Fort Lewis (Landfill No. 5)	Tacoma	R	
13	MN	Twin Cities Air Force (SAR Lndfil)	Minneapolis	R	
13	MO	Lake City Army Plant (NW Lagoon)	Independence	R	O
13	IL	Joliet Army Ammu Plant (Mfg Area)	Joliet	R	O
13	WA	Fairchild Air Force Base (4 Areas)	Spokane County	R	
14	TX	Lone Star Army Ammunition Plant	Texarkana	R	
14	OR	Umatilla Army Depot (Lagoons)	Hermiston	R	
14	WA	Bangor Ordnance Disposal	Bremerton	R	
15	LA	Louisiana Army Ammunition Plant	Doyline	R	
15	CA	Moffett Naval Air Station	Sunnyvale	R	
15	CA	Mather AFB (AC&W Disposal Site)	Sacramento	R	

Number of NPL Federal Facility Sites: 41

¹ Sites are placed in groups (Gr) corresponding to groups of 50 on the final NPL.

² V=Voluntary or negotiated response; F=Federal enforcement; D=Category to be determined; R=Federal and State response; S=State enforcement.

³ I=Implementation activity underway, one or more operable units; O=One or more operable units completed; others may be underway; C=Implementation activity completed for all operable units.

[FR Doc. 89-5692 Filed 3-10-89; 8:45 am]

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Register

**Monday
March 13, 1989**

Part VI

Environmental Protection Agency

40 CFR Part 300

**The National Priorities List for
Uncontrolled Hazardous Waste Sites;
Listing Policy for Federal Facilities;
Notice of Policy Statement**

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 300

[FRL-3535-2]

The National Priorities List for Uncontrolled Hazardous Waste Sites; Listing Policy for Federal Facilities

AGENCY: Environmental Protection Agency.

ACTION: Notice of policy statement.

SUMMARY: The Environmental Protection Agency ("EPA") is announcing a policy relating to the National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, which was promulgated pursuant to section 105 of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA") (amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA")) and Executive Order 12580 (52 FR 2923, January 29, 1987). CERCLA requires that the NCP include a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States, and that the list be revised at least annually. The National Priorities List ("NPL"), initially promulgated as Appendix B of the NCP on September 8, 1983 (48 FR 40658), constitutes this list.

This notice describes a policy for placing on the NPL sites located on Federally-owned or -operated facilities that meet the NPL eligibility criteria set out in the NCP, even if the Federal facility is also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"). EPA had requested public comment on this policy on May 13, 1987 (52 FR 17991); comments received are contained in the Headquarters Superfund Public Docket. Elsewhere in today's Federal Register is a rule adding Federal facility sites to the NPL in conformance with this policy.

EFFECTIVE DATE: This policy is effective immediately.

ADDRESSES: The Headquarters Superfund Public Docket is located at the U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460. It is available for viewing "by appointment only" from 9:00 a.m. to 4:00 p.m., Monday through Friday, excluding Federal holidays. Telephone 202/382-3046.

FOR FURTHER INFORMATION CONTACT: Joseph Kruger, Hazardous Site Evaluation Division, Office of Emergency and Remedial Response

(OS-230), U.S. Environmental Protection Agency, 401 M Street SW., Washington, DC 20460, or the Superfund Hotline, phone (800) 424-9346 (or 382-3000 in the Washington, DC, metropolitan area.)

SUPPLEMENTARY INFORMATION:

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- I. Introduction
- II. Development of the Policy for Listing Federal Facility Sites
- III. Coordination of Response Authorities at Federal Facility Sites on the NPL
- IV. Response to Public Comments

I. Introduction

In 1980, Congress enacted the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. sections 9601-9657 (CERCLA or "the Act"), in response to the dangers of uncontrolled or abandoned hazardous waste sites. CERCLA was amended in 1986 by the Superfund Amendments and Reauthorization Act ("SARA"), Pub. L. No. 99-499, 100 Stat. 1613 *et seq.* To implement CERCLA, the Environmental Protection Agency ("EPA" or "the Agency") promulgated the revised National Oil and Hazardous Substances Contingency Plan ("NCP"), 40 CFR Part 300, on July 16, 1982 (47 FR 31180), pursuant to CERCLA section 105 and Executive Order 12316 (46 FR 42237, August 20, 1981). The NCP, further revised by EPA on September 16, 1985 (50 FR 37624) and November 20, 1985 (50 FR 47912), sets forth guidelines and procedures needed to respond under CERCLA to releases and threatened releases of hazardous substances, pollutants, or contaminants. In response to SARA, EPA proposed revisions to the NCP on December 21, 1988 (53 FR 51394).

Section 105(a)(8)(A) of CERCLA, as amended by SARA, requires that the NCP include criteria for "determining priorities among releases or threatened releases throughout the United States for the purpose of taking remedial action and, to the extent practicable taking into account the potential urgency of such action, for the purpose of taking removal action." Removal action involves cleanup or other actions that are taken in response to releases or threats of releases on a short-term or temporary basis (CERCLA section 101(23)). Remedial action tends to be long-term in nature and involves response actions which are consistent with a permanent remedy for a release (CERCLA section 101(24)). Criteria for determining priorities for possible remedial actions under CERCLA are included in the Hazard Ranking System ("HRS"), which

EPA promulgated as Appendix A of the NCP (47 FR 31219, July 16, 1982).¹

Section 105(a)(8)(B) of CERCLA, as amended by SARA, requires that the statutory criteria provided by the HRS be used to prepare a list of national priorities among the known releases or threatened releases of hazardous substances, pollutants, or contaminants throughout the United States. The list, which is Appendix B of the NCP, is the National Priorities List ("NPL"). Section 105(a)(8)(B) also requires that the NPL be revised at least annually.

A site can undergo CERCLA-financed remedial action only after it is placed on the final NPL as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a). Although Federal facility sites are eligible for the NPL pursuant to the NCP at 40 CFR 300.66(c)(2), section 111(e)(3) of CERCLA, as amended by SARA, limits the expenditure of Superfund monies at Federally-owned facilities. Federal facility sites also are subject to the requirements of CERCLA section 120, added by SARA.

This notice announces the Agency's policy of including on the NPL Federal facility sites that meet the eligibility requirements (e.g., an HRS score of 28.50), even if such facilities are also subject to the corrective action authorities of Subtitle C of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. 6901-6991(i). Elsewhere in today's Federal Register EPA is adding Federal facility sites to the NPL in conformance with this policy.

II. Development of the Policy for Listing Federal Facility Sites

CERCLA section 105(a)(8)(B) directs EPA to list priority sites "among" the known releases or threatened releases of hazardous substances, pollutants, or contaminants, and section 105(a)(8)(A) directs EPA to consider certain enumerated and "other appropriate" factors in doing so. Thus, as a matter of policy, EPA has the discretion not to use CERCLA to respond to certain types of releases.

When the initial NPL was promulgated (48 FR 40662, September 8, 1983), the Agency announced certain listing policies relating to sites that might qualify for the NPL. One of these policies was that RCRA land disposal units that received hazardous waste after July 26, 1982 (the effective date of the RCRA land disposal regulations)

¹ EPA proposed major revisions to the HRS on December 23, 1988 (53 FR 51962); however, the current HRS applies to the listing of sites on the NPL until the revised HRS is finalized and takes effect. CERCLA section 105(c)(1).

would generally not be included on the NPL. On April 10, 1985 (50 FR 14117), the Agency announced that it was considering revisions to that policy based upon new authorities of the Hazardous and Solid Waste Amendments of 1984 ("HSWA") that allow the Agency to require corrective action at solid waste management units of RCRA facilities in addition to regulated hazardous waste management units.

On June 10, 1986 (51 FR 21057), EPA announced several components of a final policy for placing RCRA-regulated sites on the NPL, but made clear that the policy applied only to non-Federal sites. The Policy stated that the listing of non-Federal sites with releases that can be addressed under the expanded RCRA Subtitle C corrective action authorities generally would be deferred. However, certain RCRA sites at which Subtitle C corrective action authorities are available would generally be listed if they had an HRS score of 28.50 or greater and met at least one of the following criteria:

- Facilities owned by persons who have demonstrated an inability to finance a cleanup as evidenced by their invocation of the bankruptcy laws.
- Facilities that have lost authorization to operate, and for which there are additional indications that the owner or operator will be unwilling to undertake corrective action.
- Sites, analyzed on a case-by-case basis, whose owners or operators have a clear history of unwillingness to undertake corrective action.²

On June 10, 1986 (51 FR 21059), EPA stated that it would consider at a later date whether this revised policy for deferring non-Federal RCRA-regulated sites from the NPL should apply to Federal facilities.

On October 17, 1986, SARA took effect, adding a new section 120 to CERCLA devoted exclusively to Federal facilities. Section 120 explains the applicability of CERCLA to the Federal Government, and generally sets out a scheme under which contaminated Federal facility sites should be included in a special docket, evaluated, placed on the NPL (if HRS scores so warrant), and addressed pursuant to an Interagency Agreement with EPA.

As part of its deliberations on a Federal facilities listing policy, EPA considered pertinent sections of SARA and the proposed policy concerning

RCRA corrective action at Federal facilities with RCRA-regulated hazardous waste management units (51 FR 7722, March 5, 1986). Specifically, that policy stated that:

- RCRA section 3004(u) subjects Federal facilities to corrective action requirements to the same extent as privately-owned or -operated facilities.
- The definition of a Federal facility boundary is equivalent to the property-wide definition of facility at privately-owned or -operated facilities.

The Agency determined that the great majority of Federal facility sites that could be placed on the NPL have RCRA-regulated hazardous waste management units within the Federal facility property boundaries, subjecting them to RCRA corrective action authorities. Therefore, application to Federal facilities of the March 5, 1986 boundary policy and the June 10, 1986 RCRA deferral policy would result in placing very few Federal facility sites on the NPL. However, CERCLA and its legislative history indicate that Congress clearly intended that Federal facility sites generally be placed on the NPL and addressed under the process set out in CERCLA section 120(e). Thus, EPA concluded that the RCRA deferral policy applicable to private sites might not be appropriate for Federal facilities. On May 13, 1987 (52 FR 17991), the Agency announced that it was considering adopting a policy for listing Federal facility sites that are eligible for the NPL, even if they are also subject to the corrective action authorities of Subtitle C of RCRA; public comment was specifically requested on this approach.

Congress' intent that Federal facility sites should be on the NPL, even if RCRA corrective action authorities apply, is evidenced by the nature of the comprehensive system of site identification and evaluation set up by CERCLA section 120, added by SARA. First, in section 120(c), EPA is required to establish a "Federal Agency Hazardous Waste Compliance Docket," based on information submitted under sections 103 and 120(b) of CERCLA, and sections 3018, 3005, and 3010 of RCRA.³

² Section 3016 of RCRA provides for the inventory of Federal sites where RCRA hazardous waste "is stored, treated, or disposed of or has been disposed of at any time"; section 3005 of RCRA requires the filing of information necessary for the issuance of permits (or the obtaining of interim status) to treat, store, or dispose of hazardous waste under RCRA; and RCRA section 3010 requires notifications that a RCRA hazardous waste is being generated, transported, treated, stored, or disposed of.

Thus, the docket is based heavily on information provided by Federal facilities that are subject to RCRA. If Congress had intended that Federal facilities subject to RCRA authorities should not also be examined under the Federal facility provisions of CERCLA, then the legislators would not have directed EPA to develop a docket of facilities (for evaluation under CERCLA) composed largely of Federal facilities subject to RCRA.

Second, the Agency is also directed, in CERCLA section 120(d), to "take steps to assure that a preliminary assessment is conducted for each facility on the docket," and where appropriate, to include such facilities on the NPL if the facility meets "the criteria established in accordance with section 105 under the National Contingency Plan for determining priorities among releases." (EPA does apply the CERCLA section 105 criteria—the Hazard Ranking System (HRS)—to Federal, as well as private, sites.) Here again, if Congress had intended that Federal facilities subject to RCRA authorities not be placed on the NPL, then the legislators would not have required EPA to evaluate for the NPL all Federal facilities in the docket—the large majority of which are subject to RCRA authorities.

Third, Congress set up the Interagency Agreement (IAG) process (CERCLA section 120(e) (2)-(4)) to evaluate the need for cleanups of Federal facility sites. If all Federal facility sites subject to RCRA Subtitle C were deferred from listing and attention under CERCLA, few Federal sites would come within the IAG process, contrary to Congressional intent.

Rather, Congress intended that EPA list, and evaluate in the IAG process, all Federal facility sites that are eligible for the NPL, including those facilities subject to RCRA Subtitle C authorities. As Senator Robert T. Stafford stated during the floor debate on section 120 of SARA (subsequently section 120 of CERCLA):

[T]he amendments require a comprehensive nationwide effort to identify and assess all Federal hazardous waste sites that warrant attention. 132 Cong. Rec. S 14902 (daily ed., October 3, 1986) (emphasis added).

EPA has long expressed the view that placing Federal facility sites on the NPL serves an important informational function and helps to set priorities and focus cleanup efforts on those Federal sites that present the most serious problems (50 FR 47931, November 20, 1985).

³ On August 9, 1986 (53 FR 30002/30005), EPA published additional information on Agency policy concerning criteria to determine if an owner or operator is unwilling or unable to undertake corrective action.

EPA believes that today's decision not to apply the June 1986 NPL/RCRA policy (for non-Federal sites) to Federal facilities is consistent with section 120(a)(2) of CERCLA, which provides that "all guidelines, rules, regulations and criteria which are applicable to . . . inclusion on the National Priorities List, or applicable to remedial actions . . . shall also be applicable to [Federal facilities]." Given Congressional intent that Federal facility sites should be included on the NPL, EPA interprets section 120(a)(2) to mean that the criteria to list sites should not be more exclusionary than the criteria to list non-Federal sites on the NPL. As discussed in the May 13, 1987, notice on the policy (52 FR 17992-3), most Federal facilities include RCRA-regulated hazardous waste management units and thus, almost all waste contamination areas within facility boundaries are subject to RCRA corrective action authorities; in addition, key exclusions in the non-Federal RCRA deferral policy are not applicable to Federal facilities. Thus, if the non-Federal RCRA deferral policy were applied to Federal sites, very few Federal sites would be listed.

The Agency believes that although section 120(a)(2) evidences Congress' intent that the Federal agencies comply with the same baseline of requirements applicable to private sites, the section does not require that all policies and requirements applicable to private and Federal facility sites be identical. Indeed, Congress specifically set out a series of requirements which apply to Federal facilities in a manner different from, or in addition to, those applicable to private sites, e.g., the preparation of a separate Federal Agency Hazardous Waste Compliance Docket (section 120(c)); the notification required before Federal agencies may transfer property (section 120(h)); and the entire process for signing Interagency Agreements at Federal facility sites (section 120(e) (2)-(4)).

Just as Congress recognized that there are unique aspects of Federal facilities requiring additional or special attention in the contexts just named, special attention is also required in deciding what listing/deferral policy should apply to Federal versus private sites. EPA's opinion is that significant differences inherent in the rules to which Federal facility sites and private sites are subject under CERCLA and the NPL dictate that different listing and deferral policies should be crafted for each class of facilities.

For private sites, the only legal significance of NPL listing is that the site

becomes eligible for *Fund-financed* remedial action, as provided in the NCP at 40 CFR 300.66(c)(2) and 300.68(a)(1) (removal actions and enforcement actions can be taken at private sites regardless of NPL status). Indeed, EPA recently suggested in the preamble to proposed revisions to the NCP (53 FR 51418, December 21, 1988) that it may be appropriate to view the non-Federal NPL "as a list for informing the public of hazardous waste sites that appear to warrant . . . remedial action through CERCLA funding along." This relationship between the NPL and the availability of Fund monies (at private sites) is a central factor behind EPA's deferral policies. EPA has concluded that by deferring to other statutes like RCRA, "a maximum number of potentially hazardous waste sites can be addressed and EPA can direct its CERCLA efforts (and Fund monies, if necessary) to those sites where remedial action cannot be achieved by other means" (53 FR 51415, December 21, 1988). However, this goal of maximizing the use of limited Fund monies does not apply to Federal facility sites.

Federal facility sites on the NPL are not eligible for *Fund-financed* remedial actions (except in the very limited cases described in CERCLA section 111(e)(3)), pursuant to the NCP at 40 CFR 300.66(c)(2). Thus, the deferral of Federal facility sites from the NPL would not result in significant economies to the Fund, although it could do harm to the informational and management goals of including Federal facility sites on the NPL, as well as Congressional intent. Although the Agency might have decided to defer Federal facility sites subject to RCRA based on a desire to avoid duplication in remedial actions (another of the purposes behind RCRA deferral for private sites), EPA has concluded that this goal may be accomplished satisfactorily for Federal facilities through the process, set out in CERCLA section 120 (e)(2)-(e)(4), of developing comprehensive IAGs. As discussed in detail below, EPA will attempt to use the IAG process to achieve efficient, comprehensive solutions to site problems, and where appropriate, to divide responsibilities for cleanup among the various applicable authorities.

Finally, the deferral of Federal facility sites to RCRA-authorized States, in lieu of evaluation under the IAG process, may be inconsistent with the intent of CERCLA section 120(g), which provides that "no authority vested in the [EPA] Administrator under this section [120] may be transferred" to any person. 42 U.S.C. 9620(g).

III. Coordination of Response Authorities at Federal Facility Sites on the NPL

EPA recognizes that when it takes action under CERCLA to address a facility that is also subject to RCRA authorities, there is some risk of overlap or even conflict. Such conflict situations are not a problem where EPA is responsible for carrying out the requirements of both RCRA and CERCLA (since any jurisdictional overlaps can be managed within EPA). However, an overlap of authority may yield disagreements as to how a site should be cleaned up where a State has been authorized to carry out all or part of the RCRA program.⁴

However, this potential overlap between RCRA and CERCLA cleanup authorities is the result of Congressional design, not site listings. EPA neither intends nor believes that site listings themselves create a conflict between CERCLA and RCRA (or State law); rather, any conflict stems from the overlap of the corrective action authorities of the two statutes. The overlap exists whenever EPA takes CERCLA action at a site that has regulated hazardous waste management units subject to a State's RCRA program or other State law. EPA can take such CERCLA actions at sites *not* on the NPL as well as at sites on the NPL.⁵ (Such conflicts may also occur at private sites as well as at Federal facility sites.) There may also be cases where the applicability of both RCRA and CERCLA authorities at NPL sites does *not* create a conflict—for example, where the RCRA hazardous waste management units are not included within the area to be addressed under CERCLA, or where the release is exempt from action under RCRA. Thus, conflict between RCRA and CERCLA corrective actions can occur at virtually any point in the process or not at all.

How RCRA authorities are affected (if at all) when CERCLA also applies to a site is a matter that varies greatly, depending upon the facts of the site. In some cases, the NPL site is physically distinct from the RCRA-regulated

⁴ EPA recognizes that many States have hazardous waste laws independent of that upon which the State's authorized RCRA program may be based. Although this policy statement focuses primarily on the mechanism for applying RCRA (by EPA or authorized States) to Federal facilities on the NPL, the same analysis would apply to non-RCRA State laws that potentially overlap with CERCLA response authorities.

⁵ Removal actions, as well as remedial actions ordered under section 106 of CERCLA, may be taken at non-NPL sites. See 40 CFR 300.66(c)(2) and 300.68(a)(1).

hazardous waste management units, and corrective action or closure at the regulated units may proceed under RCRA, while at the same time a cleanup action is proceeding at another area of the property under CERCLA, without the risk of inconsistency or duplication of response action. In other cases, the releases or contaminant plumes may overlap, such that a comprehensive solution under one statute may be the most efficient and desirable solution. The questions of which authority should control, and of how to avoid potential duplication or inconsistency, are often implementation issues, to be resolved in light of the facts of the case and after consultation between EPA and the concerned State.

EPA's belief is that in most situations, it is appropriate to address sites comprehensively under CERCLA, pursuant to an enforceable agreement (i.e., an IAG under CERCLA section 120), signed by the Federal facility, EPA, and, where possible, the State. In some circumstances, it may be appropriate under an IAG to divide responsibilities, focusing CERCLA activity only on certain prescribed units, leaving the cleanup of other units under the direct control of RCRA authorities, such as where the RCRA-regulated hazardous waste management unit is physically distinct from the CERCLA contamination and its cleanup would not disrupt CERCLA activities. Alternatively, the IAG can prescribe divisions of responsibility, such as stating that CERCLA will address ground water contamination while RCRA will address the closure of regulated hazardous waste management units. Any disagreements in the implementation of the IAG would be resolved by the signatory parties under the dispute resolution terms of the IAG.

Of course, there may be cases where a RCRA-authorized State declines to join the IAG process, or agreement on the terms of an IAG cannot be achieved. For instance, State officials may decide that the proper closure of a landfill should be accomplished through excavation, while CERCLA officials may determine that the same area should be managed differently as part of a comprehensive CERCLA action at the site. Although EPA will try to resolve any such conflicts and achieve agreement with the State in the IAG process, there may be cases where the conflicting views of EPA and the State concerning corrective action cannot be resolved.

CERCLA section 122(e)(6), entitled "inconsistent response actions," gives specific guidance on this point:

INCONSISTENT RESPONSE ACTION.—When either the President, or a potentially responsible party pursuant to an administrative order or consent decree under this Act, has initiated a remedial investigation and feasibility study [RI/FS] for a particular facility under this Act, no potentially responsible party may undertake any remedial action at the facility unless such remedial action has been authorized by the President.

As the Conference Report on SARA noted, section 122(e)(6) was included in the bill "to clarify that no potentially responsible party [PRP] may undertake any remedial action at a facility unless such remedial action has been authorized by the President" (or his delegate, EPA)*. See H.R. Rep. 962, 99th Cong., 1st Sess. at 254 (1986). See also 132 Cong. Rec. S14919 (daily ed., October 3, 1986) ("This is to avoid situations in which the PRP begins work at a site that prejudices or may be inconsistent with what the final remedy should be or exacerbates the problem.")⁷ This authorization requirement applies to any remedial actions taken by a PRP, including those actions ordered by a State, as both types of action could be said to present a potential conflict with a CERCLA-authorized action.*

* The authority under section 122(e)(6) to authorize a remedial action to continue after the initiation of an RI/FS at an NPL site has been delegated to the EPA Administrator. See Executive Order 12580, section 4(d)(1) (52 FR 2923, January 29, 1987). For most non-NPL sites, the general authority for carrying out the requirements of CERCLA section 122 has been delegated to the Federal agencies for sites under their jurisdiction or control; however, the ability of the Federal agencies to authorize sites under section 122(e)(6) is limited by the provisions of section 120(a)(4), as discussed below.

⁷ Congress' intent that CERCLA actions should proceed without potential conflict with other remedial action is also suggested by the language in section 7002(b)(2)(B) of RCRA, which states that RCRA citizen suits alleging an imminent and substantial endangerment may not be brought if EPA: has commenced an action under CERCLA section 106 (or RCRA 7003); is engaging in a removal action under CERCLA section 104; or has incurred costs to begin an RI/FS under CERCLA and is diligently proceeding with remedial action; or has obtained a court order (including a consent decree) or issued an administrative order under CERCLA section 106 or RCRA section 7003, and a responsible party is diligently conducting a removal, an RI/FS, or proceeding with remedial action pursuant to that order. Similarly, RCRA section 1006(b) directs the Administrator to "integrate all provisions of [RCRA] for purposes of administration and enforcement and shall avoid duplication to the maximum extent practicable," with appropriate provisions of laws (such as CERCLA) granting regulatory authority to EPA.

* "Remedial action" is very broadly defined in section 101(24) of CERCLA as actions consistent with a permanent remedy at a site, including confinement of a release of hazardous substances, cleanup of hazardous substances, etc. EPA believes that remedial actions within the meaning of [RCRA] may include those taken under statutes other than CERCLA, including corrective action under RCRA.

CERCLA section 122(e)(6) does not constitute a prohibition on RCRA corrective action at CERCLA sites; rather, it provides a mechanism by which the Agency must approve of remedial actions commenced at sites after an RI/FS has been initiated under CERCLA. Such an approach would help to avoid duplicative and wasteful cleanup actions. This authorization mechanism would not affect normal hazardous waste management requirements under RCRA, such as complying with manifest, 90-day storage, and labeling requirements; any RCRA-regulated hazardous waste management units operating at a CERCLA site must continue to comply with RCRA hazardous waste management requirements, even if a CERCLA response action is underway. The Agency also intends to authorize many State RCRA actions to continue, e.g., where the RCRA action addresses a unit distinct from the CERCLA contamination, and where the RCRA action will not disrupt CERCLA activities.

Even where EPA decides that it is not appropriate to authorize a RCRA or other State action to continue under CERCLA section 122(e)(6) in order to avoid disruption or duplicative actions, CERCLA section 120(f) specifically provides that participation by State officials in remedy selection "shall be provided in accordance with section 121," and CERCLA section 121(d) specifically provides a process for taking account of "applicable or relevant and appropriate requirements" (ARARs) of RCRA (as well as other State and Federal statutes) when a remedy is selected. If any State requirements are waived pursuant to CERCLA section 121(d)(4), the affected State may obtain judicial review of such waiver, and even if unsuccessful, may ensure that those requirements are met by providing the necessary additional funding pursuant to CERCLA section 121(f)(3)(B). As the Agency has noted repeatedly in the past, "it is EPA's expectation that remedies selected and implemented under CERCLA will generally satisfy the RCRA corrective action requirements, and vice versa" (52 FR 17993, May 13, 1987, and 52 FR 27645, July 22, 1987).⁸

The discretion under CERCLA section 122(e)(6) not to authorize a PRP to go forward with a remedial action at a site

⁸ To the extent that this policy may be read as inconsistent with the district court's opinion in *State of Colorado v. U.S. Department of the Army*, C.A. No. 86-C-2524 (D. Colo., February 24, 1989), EPA disagrees with that opinion.

after a CERCLA remedial investigation/feasibility study (RI/FS) has begun—even if that action has been ordered by a State—is generally available at both private and Federal facility sites. However, CERCLA section 120(a)(4) provides that State laws shall apply to remedial actions—including those under CERCLA—at Federal facility sites that are not on the NPL, thus, acting as a general limitation on the more general section 122(e)(6).¹⁰ Of course, no such limitation applies to Federal facility sites once they are placed on the NPL.

The plain language of section 122(e)(6) makes it clear that it is the RI/FS—not the listing itself—that triggers section 122(e)(6). Indeed, an RI/FS may be commenced prior to, as well as after, NPL listing.¹¹ This is especially true for Federal facility sites, as the President has delegated his authority to take CERCLA section 104 response actions (including RI/FSs) to the Federal agencies for most non-NPL sites (Executive Order 12580, at section 2(e)(1)).¹² Thus, when a Federal facility is placed on the NPL, an RI/FS will often have been commenced (or completed).

In order to invoke the authorization mechanism of CERCLA section 122(e)(6), EPA must make a threshold determination of whether or not an RI/FS “under this Act [CERCLA]” has been initiated; studies conducted by Federal facilities before a site has been placed on the NPL may or may not constitute an appropriate RI/FS in EPA’s opinion.¹³ As a matter of policy, the

Agency will generally interpret CERCLA-quality RI/FSs to be those that are provided for, or adopted by reference, in an IAG. The Agency believes that such a policy is consistent with CERCLA section 120(e)(1), which directs Federal facilities, “in consultation with EPA,” to commence an RI/FS within six months of the facility’s listing on the NPL. In addition, the policy will promote consistency in RI/FS’s, and will help to ensure that all appropriate information has been collected during the RI/FS, so that EPA may properly evaluate remedial alternatives at Federal facility sites as required under CERCLA section 120(e)(4). Further, by encouraging the development of IAGs at the early RI/FS stage, this policy may help to promote coordination among the parties, and avoid inconsistent actions.

Thus, the IAG will generally commit the Federal facility to complete both an RI/FS and any subsequent remedial action determined by EPA to be necessary.

Once an RI/FS has been commenced under (or incorporated into) an IAG, EPA must decide whether or not to authorize PRPs to continue with any non-CERCLA remedial actions (both voluntary and State-ordered) at the site. This decision will be made on a case-by-case basis, taking into account the status of CERCLA activities at the site, and the potential for disruption of or conflict with that work if the PRP action were authorized.

IV. Response to Public Comments

On May 13, 1987 (52 FR 17991), EPA solicited public comment on the Agency’s intention to adopt a policy for including eligible Federal facility sites on the NPL, even if they are also subject to RCRA corrective action authorities; the Agency received six comments on the policy. EPA considered the comments raised, and responds to them as follows.

Two of the six commenters concur with the policy to include eligible Federal facility sites on the NPL and have no suggested revisions or additional comments.

One commenter “generally supports” the policy, but believes that the criteria used to list Federal facility sites are unclear. The commenter states that “as written, the proposed policy could be interpreted to mean that Federal hazardous facilities would be placed on the NPL regardless of their status under [RCRA] or their degree of actual hazard.”

In response, the commenter is correct in concluding that under the policy,

Federal facility sites would be placed on the NPL regardless of the facility’s status under RCRA. As discussed above, this is consistent with Congressional intent that Federal facility sites should be on the NPL, and that listing criteria should not be applied to Federal sites in a manner that is more exclusionary than for private sites. However, the commenter is incorrect in suggesting that Federal facility sites will be listed regardless of the degree of hazard they present. The Agency intends to use the HRS, the same method used for non-Federal sites, to determine whether a Federal facility site poses an actual or potential threat to health or the environment and, therefore, qualifies for the NPL. (Currently, a site is generally eligible for the NPL if the HRS score is 28.50 or greater.) The application of the HRS to Federal facility sites is consistent with CERCLA section 120(d), which requires EPA to use the HRS in evaluating for the NPL the facilities on the Federal Agency Hazardous Waste Compliance Docket.

One commenter did not comment on the policy, but rather is concerned that no Superfund monies be spent at Federal facilities. The commenter believes that neither pre-remedial work (preliminary assessments and site inspections) nor remedial work should be financed by the Trust Fund.

In response, Executive Order 12580 (52 FR 2923, January 29, 1987), at section 2(e), delegates the responsibility for conducting most pre-remedial work to the Federal agencies. Therefore, the Federal agencies, rather than the Trust Fund, finance these activities, with EPA providing oversight. In addition, section 111(e)(3) of CERCLA, as amended by SARA, strictly limits the use of the Fund for remedial actions at Federally-owned facilities. Although the Administrator does have the discretion to use funds from the Hazardous Substances Superfund to pay for emergency removal actions for releases or threatened releases from Federal facilities, the concerned Executive Agency or department must reimburse the Fund for such costs. Executive Order 12580, section 9(i). The Department of Defense and the Department of Energy also have response authority for emergency removals (Executive Order, section 2(d)).

Another commenter opposes the policy of placing RCRA-regulated Federal facilities on the NPL, arguing that public notification is adequately addressed by other provisions of CERCLA (sections 120 (b), (c), and (d)), and that the policy is inconsistent with section 120(a), which requires that

¹⁰ Section 120(a)(4) states as follows: State laws concerning removal and remedial action, including State laws regarding enforcement, shall apply to removal and remedial action at facilities owned or operated by a department, agency, or instrumentality of the United States when such facilities are not included on the National Priorities List. [Emphasis added.]

Nothing in this section prevents Federal facilities from arguing that the doctrines of laches, estoppel or implied preemption limit the effect of section 120(a)(4).

¹¹ See *SCA Services of Indiana, Inc. v. Thomas*, 634 F.Supp. 1355, 1361 (W.D. Ind. 1986) (“CERCLA clearly makes the conduct of an RI/FS a removal, not remedial, action, so that the restriction that remedial actions be taken only when the site is on the NPL is simply irrelevant to a RI/FS”); 52 FR 27622 (July 22, 1987) (“an RI/FS can be performed at proposed [NPL] sites pursuant to the Agency’s removal authority under CERCLA”).

¹² Section 104 authorities were delegated to the Departments of Defense and Energy more generally, although such functions must still be exercised consistent with the requirements of section 120 of CERCLA. Executive Order 12580, section 2(d).

¹³ “RI/FS” is a term of art under CERCLA, and applies to a special site study and evaluation pursuant to section 300.68(d) of the NCP. EPA, as the agency entrusted with the development and implementation of the NCP, is the recognized expert on what constitutes an acceptable RI/FS under CERCLA.

Federal facilities comply with CERCLA in the same manner as any nongovernmental entity. The commenter believes that the adoption of the proposed policy is inconsistent with EPA's policy regarding non-Federal facilities.

In response, CERCLA sections 120 (b), (c), and (d) refer to the establishment of the Federal Agency Hazardous Waste Compliance Docket and to the evaluation of facilities on the docket for the NPL.¹⁴ The Agency agrees that this docket will provide the public with some information regarding hazardous waste activities at Federal facilities, as well as information concerning contamination of contiguous or adjacent property. The Agency believes, however, that evaluating sites using the HRS, and placing on the NPL those sites that pose the most serious problems, will serve to inform the public of the relative hazard of these sites. The listing process also affords the public the opportunity to examine HRS documents and references for a particular site, and to comment on a proposed listing. In addition, the NPL provides response categories and cleanup status codes for sites, and deletes sites when no further response is required, adding to the informational benefits of using the NPL. Therefore, EPA believes that listing Federal facility sites will advise the public of the status of Federal government cleanup efforts, as well as help Federal agencies set priorities and focus cleanup efforts on those sites that present the most serious problems, consistent with the NCP (50 FR 47931, November 20, 1985).

As to the comment concerning CERCLA section 120(a), EPA agrees that the section provides that Federally-owned facilities are subject to and must comply with CERCLA to the same extent as any nongovernmental entity. Further, sections 120(a)(2) and 120(d) provide that EPA should use the same rules and criteria to evaluate Federal sites for the NPL as are applied to private sites. However, today's policy is not inconsistent with those sections. As a threshold matter, it is uncontested that an HRS score of 28.50 or greater is an eligibility requirement for both Federal and private sites. The question

is, should NPL-eligible Federal sites be deferred from listing as a matter of policy. As explained above, the Agency does not believe that CERCLA section 120(a)(2) can be read to require identical treatment of Federal and private sites in all circumstances; the fact that Congress legislated a number of requirements in addition to, or instead of, those applicable to private facilities (e.g., sections 120 (c), (e)(2), (h)), demonstrates the legislators' recognition of the need to address certain unique aspects of Federal facilities differently than for private sites. Rather, EPA interprets CERCLA section 120(a) to mean that the criteria to list Federal facility sites should not be more exclusionary than the criteria to list non-Federal sites. In this case, it is clear that if EPA were to apply the non-Federal RCRA deferred listing policy to Federal facilities, very few Federal sites would be considered for the NPL, counter to the spirit and intent of section 120 (c) and (d) of CERCLA and the statute's legislative history. Moreover, one of the key factors in EPA's decision to adopt a RCRA deferral policy for private sites—the need to manage and conserve Fund resources—does not apply to Federal facilities because the remedies are not Fund-financed. EPA believes that it is appropriate, and consistent with Congressional intent, to take these differences into account, as long as the result is not to treat Federal agencies in a more exclusionary manner than private facilities.

Two commenters expressed concern that listing Federal facility sites might interfere with enforcement activities under RCRA. One commenter stated that the policy is inconsistent with CERCLA section 120(i), which requires that Federal facilities comply with all RCRA requirements.

In response, the Agency's view is that today's policy will facilitate enforcement activities at Federal facility sites, not interfere with them. In effect, by encouraging the drafting of comprehensive IAGs for Federal facilities, this policy will advance the goal of site remediation. In addition, the IAG process allows EPA to take steps to avoid duplication and conflict; the IAG may define areas of a Federal facility that may efficiently be addressed under RCRA (e.g., units that are distinct from, and do not disrupt, CERCLA activities). In addition, States will be encouraged to become signatory parties to IAGs, reducing the likelihood of intergovernmental conflict over jurisdiction and the selection of remedy.

In any event, it is not the act of placing a site on the NPL that creates a

potential conflict between CERCLA and RCRA; rather, the corrective action authorities of the two statutes overlap, pursuant to statutory design. Indeed, the alleged interference with RCRA corrective actions by CERCLA cleanups can occur at any point in the process, depending upon the specific facts of the case. In those cases where the relevant statutes do overlap, EPA believes that one of the statutes must sometimes be chosen for practical reasons, and Congress has set out a procedure for resolving such conflicts in CERCLA section 122(e)(6).¹⁵ However, the goal of today's policy is to minimize any such conflicts through the IAG process.

The Agency acknowledges that in the case of Federal facilities, listing does have a significance not present for private sites. For instance, CERCLA section 120(e)(2) provides that for Federal facility sites on the NPL, EPA will play a role in selecting remedies, while CERCLA section 120(a)(4) provides that State laws concerning removal and remedial actions shall apply to Federal facilities when such facilities are not on the NPL (the section does not discuss how State laws apply at Federal sites that are on the NPL). However, any difference in EPA or State roles at NPL versus non-NPL Federal facility sites results from the statutory scheme reflected in CERCLA sections 120(a)(4) and 121(d), and not from the act of listing itself. CERCLA directs EPA to list Federal sites on the NPL and then specifies certain statutory consequences.

Further, merely alleging that there may be some effect on State enforcement actions as a result of a policy of including Federal facilities on the NPL is not grounds for rejecting today's policy. The Agency has reviewed both sides of the question, and has determined that it is in the best interest of the public and environmental protection to place Federal facility sites on the NPL and thus to make CERCLA authorities available to achieve comprehensive remedies for contamination at such sites (when appropriate). In addition, the IAG process, as discussed in this policy, will serve to minimize duplication and inconsistency with potential State orders.

¹⁴Pursuant to section 120(c) of CERCLA, EPA published the Federal Agency Hazardous Waste Compliance Docket on February 12, 1988 (53 FR 4280). The docket was established based on information submitted by Federal agencies to EPA under sections 3005, 3010, and 3018 of RCRA and under section 103 of CERCLA. The docket serves to identify Federal facilities that must be evaluated in accordance with CERCLA section 120(d) to determine if they pose a risk to public health and the environment. Section 120(d) requires EPA to evaluate facilities on the docket using the HRS for possible inclusion on the NPL.

¹⁵It is important to note that the section 122(e)(6) authorization requirement at Federal facilities is not triggered automatically by NPL listing, but rather takes effect where an RI/FS has been initiated at a listed Federal site; as a matter of policy, this start-up point for the RI/FS will not be recognized in most cases until an enforceable IAG has been signed, which may be well after a site is listed.

EPA also disagrees with the commenter's suggestion that today's policy is inconsistent with CERCLA section 120(i), which provides that "nothing in this section [120] shall affect or impair the obligation of any department, agency, or instrumentality of the United States to comply with any requirement of the Solid Waste Disposal Act [RCRA] (including corrective action requirements)." EPA interprets that section simply to mean that section 120 does not impair otherwise applicable RCRA requirements; this mandate is met even if an action is conducted under CERCLA, as CERCLA section 121(d)(2) specifically provides that ARARs of RCRA and State law must be achieved with regard to any on-site remedy. Even if a RCRA or State requirement that is

an ARAR is waived by EPA (section 121(d)(4)), the State may obtain judicial review of such a waiver, and even if unsuccessful, may require that the remedial action conform to the requirement in question by paying the additional costs of meeting such standard (CERCLA section 121(f)(3)); thus, the intent of section 120(i) is satisfied.

This interpretation of section 120(i) follows directly from the language of the provision itself, which states that "nothing in this section"—as compared to "nothing in this Act"—shall affect RCRA obligations. This leaves in place limitations contained in other sections of the statute, such as the permit waiver provision (section 121(e)); the process for selecting and waiving ARARs

(sections 121 (d)(2) and (d)(4)); and the ban on remedial actions not approved by the President (section 122(e)(6)).

For all these reasons, the Agency believes that today's Federal facilities listing policy is appropriate, that it reflects Congressional intent, and that it is consistent with CERCLA.

Pursuant to the policy described in this notice, the Agency will place eligible Federal facility sites on the NPL even if the site is also subject to the corrective action authorities of Subtitle C of RCRA.

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